(172)

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/435
19 February 1997

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirtieth session
Vienna, 12-30 May 1997

REPORT OF THE WORKING GROUP ON INSOLVENCY LAW ON THE WORK OF ITS TWENTY-FIRST SESSION (New York, 20-31 January 1997)

CONTENTS

	Paragraphs	Page
INTRODUCTION	1-12	4
I. DELIBERATIONS AND DECISIONS	13-16	6
II. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY	17-200	6
A. Consideration of draft provisions	17-184	6
Article 15. Relief upon application for recognition of a foreign proceeding	17-23	6
Article 16. Relief upon recognition of a foreign main proceeding	24-48	8
Article 17. Relief upon recognition of a foreign main or non-main proceeding	49-66	12
Article 18. Notice of recognition and relief granted upon recognition	67-71	16
Article 19. Protection of creditors and the debtor	72-78	17
Article 20. Intervention by a foreign representative in actions in this State	79-84	18

		Paragraphs	Page
CHAPTER IV.	COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES	85-98	19
Article 21.	Authorization of cooperation and direct communication with foreign courts and foreign representatives	85-95	19
Article 23.	Rate of payment of creditors	96-98	21
PREAMBLE		99-100	22
CHAPTER I.	GENERAL PROVISIONS	101-128	22
Article 1.	Scope of application	101-106	22
Article 2.	Definitions and rules of interpretation	107-113	23
Article 3.	International obligations of this State	114-117	25
Article 4.	Competent [court][authority]	118-122	26
Article 5.	Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State	123-124	27
Article 6.	Public policy exceptions	125-128	27
CHAPTER II.	ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE	129-164	27
Article 7.	Access of foreign representatives to courts in this State	129-133	27
Article 8.	Limited jurisdiction	134-136	28
Article 9.	Request by a foreign representative for opening of of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*	137-146	29
Article 10.	Participation of a foreign representative in a proceeding under *[insert names of laws of the enacting State relating to insolvency]*	147-150	30
Article 11.	Access of foreign creditors to a proceeding under *[insert names of laws of the enacting State relating to insolvency]*	151-156	31
Article 12.	Notification to foreign creditors of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*	157-164	32
CHAPTER III.	RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF	165-179	34
Article 13.	Recognition of a foreign proceeding for the purpose of obtaining relief	165-173	34
Article 14.	Grounds for refusing recognition	174-179	36

	Paragraphs	Page
CHAPTER V. CONCURRENT PROCEEDINGS	180-184	37
Article 22. Concurrent proceedings	180-184	37
B. Consideration of principles underlying possible new provisions on concurrent proceedings	185-200	38
Principle 1	186-187	38
Principle 2	188-189	39
Principle 3	190-191	39
Principle 4	192-193	39
Principle 5	194-196	39
Principle 6	197-198	40
Principle 7	199-200	40
ANNEX: Draft articles of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency		41

INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency.[1]

2. Prior to the decision to undertake work on cross-border insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders (A/CN.9/398). Its purpose was to assess the desirability and feasibility of work in that area, and to define appropriately the scope of the work. The suggestion arising from the Colloquium was that work by the Commission should, at least at the initial stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

3. Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Toronto, 22-23 March 1995) (A/CN.9/413). The view of the participating judges and government officials was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.

4. The Working Group commenced its work on the project at its eighteenth session by discussing possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cross-border insolvency (A/CN.9/419).

5. At its nineteenth session, the Working Group considered a set of draft legislative provisions on judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (A/CN.9/422).

6. At its twentieth session, the Working Group focused on revised articles of the text, entitled the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency. At that session the Working Group also considered the question of the form of the instrument being prepared. A number of views and arguments were considered in favour of preparing model provisions for national legislation, model provisions for an international treaty and an international treaty. After considering the various views, the Working Group decided to continue and complete its work on the draft Model Legislative Provisions. That would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided (A/CN.9/433, paras. 16-20).

7. The Working Group held the present session in New York from 20 to 31 January 1997. The Working Group was composed of all States members of the Commission. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Bulgaria, China, Egypt, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi

---

[1] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 382-393.

Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

8. The session was attended by observers from the following States: Angola, Bangladesh, Burkina Faso, Canada, Côte d'Ivoire, Croatia, Czech Republic, Ireland, Kuwait, Lesotho, Netherlands, Pakistan, Republic of Korea, South Africa, Sweden, Switzerland, Syrian Arab Republic, Turkmenistan and Uzbekistan.

9. The session was also attended by observers from the following international organizations: European Insolvency Practitioners Association (EIPA), Hague Conference on Private International Law, Instituto Iberoamericano de Derecho Internacional Económico, International Association of Insolvency Practitioners (INSOL), International Bar Association (IBA), International Bar Foundation, International Chamber of Commerce (ICC), International Women's Insolvency and Restructuring Confederation (IWIRC) and Union Internationale des Avocats (UIA).

10. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)

Rapporteur: Mr. Joseph F. Bossa (Uganda)

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.V/WP.47) and a note by the Secretariat containing newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency (A/CN.9/WG.V/WP.48), which was used as a basis for the Working Group's deliberations.

12. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Consideration of newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency.

4. Other business.

5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

13. The Working Group considered the newly revised articles of the draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency presented in the note by the Secretariat (A/CN.9/WG.V/WP.48). It first considered draft articles 15 to 22 and thereafter draft articles 1 to 14. For lack of time, the Working Group did not consider draft article 23. At the end, the Working Group considered principles relating to possible new provisions on concurrent proceedings.

14. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.48, it established an informal drafting group to revise the draft Model Legislative Provisions, reflecting the deliberations and decisions that had taken place. The informal drafting group prepared revised provisions, except for articles 12, 13, 14 and 22. The deliberations and conclusions of the Working Group are set forth below in chapter II. The annex to the present report reproduces the draft articles proposed by the informal drafting group and articles 12, 13, 14 and 22 as revised by the Secretariat pursuant to the considerations of the Working Group. The Working Group did not have time to review the draft articles that had been prepared pursuant to its consideration.

15. The Working Group took note of a number of improvements suggested to the various language versions of the draft Model Legislative Provisions and requested the Secretariat to review the various language versions, taking into consideration the suggestions made during the session of the Working Group.

16. The Working Group noted that it would have wished to have some more time available for completing its review of the draft. Yet it decided, in line with the hope expressed by the Commission at its twenty-ninth session,[2] to submit the draft Model Legislative Provisions to the Commission for consideration and completion at its thirtieth session. It was suggested that the Commission begin its considerations with article 14 and the following articles of the draft Model Legislative Provisions.

II. DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY

A. Consideration of draft provisions

Article 15. Relief upon application for recognition of a foreign proceeding

17. The text of the article, as considered by the Working Group, read as follows:

"(1) From the time of filing an application for recognition until the application is decided upon, the court may, under the conditions in article 17, grant any relief permitted under that article.

"(2) The court shall order the foreign representative to give such notice as would be required for requests for provisional relief in this State.

"(3) Such relief may not extend beyond the date that the application for recognition is decided upon, unless it is extended under article 17(1)(c)."

Paragraphs (1) and (2)

---

[2] Official Records of the General Assembly, Fifty-first session, Supplement No. 17 (A/51/17), para. 237.

18. The view was expressed that article 15 should not refer to article 17 since a representative of a foreign non-main proceeding should not have access to all types of relief available under article 17 (see paras. 50-53 below). It was, however, considered that at the time of application for recognition it might not be clear whether the foreign proceeding was a main or a non-main proceeding and that, in any case, the court granting pre-recognition relief should be able to tailor the relief to the needs of the foreign representative. In addition, it was considered desirable for the Model Provisions to specify a minimum list of discretionary remedies that would be available in each State enacting the Model Provisions as not all States currently provided all kinds of relief provided in article 17. It was therefore thought necessary to keep the list of relief as broad and as flexible as possible, and the Working Group decided that the parallelism between the list of relief under articles 15 and 17 should be maintained. It was also decided that, instead of merely referring to "the conditions in article 17", those conditions should be spelled out in article 15. It was suggested that a representative of a foreign non-main proceeding should be able to obtain relief only insofar as it pertained to the assets covered by that proceeding, a suggestion that also applied to article 17 (see para. 53 below). A view was expressed that relief under article 15 should be limited to relief currently available under the law of the enacting State.

19. It was noted that "the court" in paragraphs (1) and (2) might be any court in the enacting State competent to issue provisional measures and not necessarily the court that, according to article 4, had jurisdiction relating to recognition of foreign proceedings and cooperation with foreign courts.

20. A suggestion was made to subject the issuance of relief under article 15 to any exceptions or limitations applicable under the law of the enacting State, in the same way as was provided in article 16(2) for relief granted under that article. However, the Working Group considered that relief under article 15 (as well as article 17) was discretionary and that there was, therefore, no need to make the issuance of the discretionary relief subject to exceptions and limitations contained in the law of the enacting State.

21. In that context it was stated that the laws of some States did not permit in situations envisaged in article 15 the issuance of all measures mentioned in article 17(1) (e.g., staying the commencement or continuation of individual actions, as provided in subparagraph (a)) and that for that reason article 15 might pose a difficulty for those States.

22. It was suggested that the measure granted under subparagraph (a) should be restricted to staying the execution of a court decision, but that a creditor should not be prevented from initiating or continuing an action to preserve a right. According to that view, a stay under the subparagraph might be in conflict with fundamental rights of each person to seek in courts the protection of its rights (see para. 54 below).

Paragraph (3)

23. According to one view, it should be provided that measures issued under article 15 were to terminate when the application for recognition was decided upon and that any measure which needed to be issued thereafter was a new measure. According to another view, which the Working Group adopted, it was useful to leave to the court a possibility to extend the relief granted upon application for recognition, so as to ensure that there was no hiatus between the provisional measure and the measure issued after recognition.

Article 16. Relief upon recognition of a foreign main proceeding

24. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main proceeding,[c]

(a) the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities shall be stayed; and

(b) the right to transfer, dispose with or encumber any assets of the debtor shall be suspended.

"(2) The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under *[insert names of laws of the enacting State relating to insolvency]*.[d]

"(3) No earlier than __ days after recognition of a foreign main proceeding, the court may permit the foreign representative to administer, realize and distribute assets of the debtor in the foreign proceeding. If a proceeding concerning the debtor under *[insert names of laws of the enacting State relating to insolvency]* has been opened, such permission may only be given after the completion of that proceeding."

General remarks

25. The Working Group considered the relationship between article 16 and the other provisions of chapter III of the draft Model Provisions. It was observed that article 16 dealt with effects that would mandatorily flow from the recognition of the foreign proceeding, while articles 15 and 17 dealt with relief that could be ordered by the court of the enacting State, at its discretion, and upon request by the foreign representative. It was also noted that, unlike articles 15 and 17, which, as currently drafted, encompassed both foreign main proceedings and foreign non-main proceedings, article 16 was intended to provide certain mandatory effects only to a foreign main proceeding, upon recognition in the enacting State. Having noted the particular nature of the provisions contained in article 16, as distinct from those provided in articles 15 and 17, the Working Group agreed that the title of article 16 should be amended and referred the matter to the drafting group.

26. It was suggested that article 16 should contain a provision that limited the mandatory effects of a foreign main proceeding so as not to go beyond the effects that such proceedings had in the originating State. The countervailing view, however, was that under such a rule it would not be possible for the court of the enacting State to determine which effects were to be given to a foreign proceeding in the enacting State without engaging in a possibly complex

---

"[c] The enacting State may wish to consider the following alternative wording to replace the chapeau of article 16 (1):

"(1) Upon recognition of a foreign main proceeding, or upon application for recognition of a foreign main proceeding taking place in one of the States listed in annex X, ..."

"[d] The enacting State may wish to consider the following two alternatives with respect to paragraph (2):

"Alternative I (addition to paragraph (2)): If the foreign main proceeding is taking place in one of the States listed in annex X, the scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding.

"Alternative II (replacement of paragraph (2)): (2) The scope of the stay and suspension referred to in paragraph (1) is subject to any exceptions or limitations applicable under the law of the foreign main proceeding."

analysis of foreign law. It was also stated that the enacting State would be concerned primarily with the effects given to a foreign proceeding in its own territory, rather than with the effects of that proceeding in the foreign jurisdiction where the proceeding originated.

27. It was noted that the provisions of article 16 had been based on the assumption that no local insolvency proceedings existed at the time the recognition of the foreign proceeding was sought. Concerns were voiced that article 16 did not adequately deal with situations where concurrent proceedings in respect of the same debtor existed in the enacting State and in the foreign jurisdiction. It was suggested that article 14 should include the existence of local proceedings among the grounds justifying the refusal of recognition to a foreign proceeding. Alternatively, article 16 should limit the effects of recognition to giving the foreign representative access to the local proceedings. Another view was that those concerns raised a question of coordination between local and foreign proceedings, and that the appropriate place for addressing them was in chapter V of the draft Model Provisions. (For a further discussion of concurrent proceedings, see paras.185-200 below.)

28. The view was expressed that article 16 should aim at the protection of all creditors, foreign and local, in essentially the same manner and should establish a parallel between the powers that could be exercised by a local and a foreign representative. It was proposed that article 16 should be redrafted to the effect that, upon recognition, the foreign representative would be given the same rights and prerogatives in respect of the assets of the debtor as were provided in local law to a local representative. In response it was said that article 16 was aimed at establishing a minimum catalogue of effects of foreign main proceedings, which would apply uniformly in all States that enacted the Model Provisions. That aim would not be achieved if the effects of the recognition varied from country to country depending upon the national law.

Paragraphs (1) and (2)

29. It was noted that article 16 contained provisions intended to protect the interests of all creditors by staying individual actions and suspending the transfer of assets of the debtor. As regards the scope of the stay of actions in paragraph (1) (a), it was also noted that article 16 was only intended to avoid dissipation of the debtor's assets that would result from individual actions against the assets of the debtors being allowed to run simultaneously to the foreign proceedings. Article 16 (1) (a) was not intended, however, to prevent the opening of a local collective proceeding. The Working Group was reminded that those provisions had been the object of extensive discussions in previous sessions of the Working Group, during which a consensus had arisen as to the need for the measures listed therein (A/CN.9/433, paras. 115-126).

30. The question was asked whether the stay of individual actions applied only to proceedings that had been opened pursuant to a definite decision, or whether it applied also in case of proceedings opened on an interim basis. In particular, there was a concern that the mandatory effect in article 16 might not be appropriate in the case of a foreign proceeding that had been commenced only on an interim basis. In response it was noted that the stay of individual actions was to apply in both situations, since both types of proceedings were encompassed by the definition of foreign proceedings contained in article 2 (a).

31. It was observed that article 16 did not address the question whether national rules on the limitation period for the commencement of individual actions would still apply to actions stayed pursuant to paragraph (2) (a). In the absence of such a rule, and with a view to avoiding adverse effects to creditors affected by the stay under paragraph (1) (a), it was suggested that an additional paragraph should be added to article 16 to authorize the commencement of individual actions to the extent that it was necessary to preserve claims against the debtor.

32. It was suggested that paragraph (1) (b) should expressly refer to the suspension of the "debtor's" right to transfer its assets, so as to make it clear that the provisions did not affect the rights that certain categories of secured

creditors, such as mortgagees, might have under some legal systems to realize their rights in those assets. For that purpose, it was suggested to add the words "of the debtor" between the words "the right" and the words "to transfer" in paragraph (1) (b).

33. Reservations were expressed with regard to the proposed amendment, which was felt to weaken the scope of the suspension under paragraph (1) (b). It was noted that paragraph (2) already made the stay and the suspension under paragraph (1) (a) and (b) subject to exceptions and limitations provided in national law. For those legal systems which exempted certain secured creditors from the suspension of transfers of assets, or which did not stay individual actions commenced by certain categories of creditors, it would be possible to maintain those exceptions under the authorization provided in paragraph (2). It was suggested that examples of those instances could be given in the guide to enactment, for the purpose of explaining the possible scope of application of paragraph (2).

34. The concern was expressed that an unqualified suspension of transfers of assets, as currently provided in paragraph (1) (b), might paralyse all transactions of the debtor in the enacting State, thus forcing the debtor's establishment in that State into insolvency. Such a result would not be in the interest of the creditors, who might be better served by ensuring the continuation of the activities of such establishment. Therefore, it was suggested that the suspension of transfers of assets should not apply to transfers that occurred in the ordinary course of business, so as not to jeopardize the financial viability of the debtor's establishment in the enacting State.

35. In response it was noted that the question of transactions that occurred in the ordinary course of business had been discussed by the Working Group in previous sessions (A/CN.9/422, paras. 108 and 109, and A/CN.9/433, paras. 124 and 125). At its twentieth session, the Working Group had agreed that it would not be feasible to attempt to address that question in the draft Model Legislative Provisions and that the matter should be left to be treated as an exception or limitation that might be made to the scope of the suspension under paragraph (2) (A/CN.9/433, para. 125).

36. The Working Group considered the question of possible sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under article 16 (1) (b). It was pointed out that the consequences of the violation of a statutory suspension of transfers varied greatly in different legal systems. Possible sanctions might include criminal sanctions, penalties and fines. In some systems, the acts themselves might be regarded as void or might be capable of being set aside pursuant to a court order.

37. It was noted, however, that these questions involved many complex issues which did not lend themselves to being addressed within the framework of the draft Model Provisions, such as the rights of third parties who acquired assets of the debtor. It was pointed out that, if included in the text, a provision on sanctions for the violation of the suspension of transfers of assets would need to be supplemented with exceptions, as provided in a number of legal systems, to protect the interests of third parties who in good faith acquired assets from an insolvent debtor without knowledge of the suspension of transfer of assets. Thus, it was generally felt that it would not be feasible to deal in the draft Model Provisions with the sanctions that might apply to the violation of article 16 (1) (b). It was proposed that the guide to enactment should mention the possible different approaches taken by national laws, pointing out that an essential purpose of those sanctions was to facilitate recovery for the insolvency proceeding of any assets unduly transferred by the debtor and that, for that purpose, the avoidance of such transactions was more effective than the imposition of criminal or administrative sanctions on the debtor.

Paragraph (3)

38. It was observed that, unlike paragraph (1), which dealt with mandatory effects of the recognition of the foreign main proceeding, paragraph (3) dealt with measures that could be granted at the discretion of the court

recognizing the foreign proceeding, under the conditions provided therein. Thus, it was proposed that the rule contained in paragraph (3) would be more appropriately placed in article 17.

39. Various interventions were made concerning the question of ensuring adequate protection of the interests of local creditors within the context of paragraph (3). The view was expressed that, as currently drafted, paragraph (3) did not afford adequate protection to the interests of local creditors, and might induce local creditors to commence a local proceeding, so as to preclude a turnover of the assets to the foreign representative for realization and distribution in the foreign proceeding, or for the purpose of securing the privileges enjoyed by their respective classes of claims under the insolvency laws of the enacting State.

40. The Working Group considered the importance of elaborating provisions that ensured adequate protection of the interests of all creditors, including creditors in the enacting State. However, the Working Group was urged to consider such protective measures in a manner that ensured the equality of creditors, rather than establishing a preferential treatment of local creditors to the detriment of foreign creditors.

41. As regards the minimum waiting period in paragraph (3) for the permission to turn over assets to the foreign representative, the view was expressed that such a period was necessary to protect the interests of local creditors, by affording them the opportunity to file claims or to request the opening of a local insolvency proceeding prior to the turnover of assets to the foreign representative.

42. Another view, however, was that the minimum period in paragraph (3) created more problems than it solved. It was pointed out that paragraph (1) (a) suspended the debtor's right to transfer or encumber any of its assets upon recognition of a foreign main proceeding, but that the recognition did not, in and of itself, place the debtor's assets and affairs under the control and the supervision of the court of the enacting State. In the circumstances, the concern was expressed that during the period contemplated in paragraph (3) uncertainties would arise as to who was responsible for the management of the debtor's assets in the enacting State. It was therefore suggested that no minimum period should be provided in paragraph (3).

43. The view was also expressed that establishing a delay for the turnover of assets to the foreign representative, as provided in paragraph (3), did not constitute an effective measure to protect the interests of local creditors. It was felt that the protection of those interests might be better addressed by requiring that the creditors be given adequate notice of the recognition prior to the turnover of assets. A suggestion was made that a separate provision should deal with such notice requirements. Having considered those views, the Working Group agreed to delete the delay provided in paragraph (3).

44. For the purpose of clarifying the scope of application of paragraph (3), it was suggested that the words "located in this State" should be added after the words "the assets".

45. Questions were raised as to the purpose of the second sentence of paragraph (3), whereby the permission for the turnover of assets might only be given after the completion of any pending local proceeding. The view was expressed that such a rule, which was intended to protect the interests of local creditors, was excessively rigid. The interests of local creditors and of the creditors as a whole were not necessarily fostered by promoting the opening of parallel proceedings. Also, in some cases it might be in the interest of all creditors, local and foreign, to assemble all assets for realization and distribution in one single proceeding. It was instead suggested that it might be sufficient to provide that, in order to grant the turnover of assets, the court of the enacting State must be satisfied that the interests of local creditors were adequately protected. It was pointed out in that connection that a number of safeguards had been inserted in article 19 and that the cooperation mechanisms provided in chapter V could also play a role in protecting the collective interests of the creditors, foreign or local. Those provisions could be developed further so as to address the concerns expressed in the Working Group.

46. After consideration of the various views expressed, the Working Group found the substance of article 16 to be generally acceptable and referred it to the drafting group to prepare a revised draft that reflected the above discussion. (For the subsequent decision to include the substance of paragraph (3) in article 17, see para. 59 below).

Footnote "c"

47. It was felt that the option provided in footnote "c" did not represent a realistic alternative. It was thus agreed to delete it.

Footnote "d"

48. The Working Group noted that the two options provided under footnote "d" made it possible to subject the effects of paragraph (1) (a) or (b) to exceptions and limitations provided in the law of the foreign main proceeding either in addition to, or in lieu of, the exceptions and limitations provided under the laws of the enacting State. It was generally felt that both options should be deleted, as they rendered difficult the application of article 16, by requiring the court of the enacting State to examine possibly complex rules of foreign law. Also, both options might weaken the scope of the stay and the suspension provided in paragraph (1) by authorizing the importation of restrictions not otherwise provided in the laws of the enacting State.

Article 17. Relief upon recognition of a foreign main or non-main proceeding

49. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any appropriate relief including:

"(a) staying the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they were not stayed under article 16 (1) (a);

"(b) suspending the transfer, disposal or encumbrance of any assets of the debtor, to the extent they were not suspended under article 16 (1) (b);

"(c) extending relief granted under article 15;

"(d) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;

"(e) entrusting the preservation and management of the assets of the debtor to the foreign representative or another person designated by the court;

"(f) granting other relief that may be available under the laws of this State."[e]

"(2) The court may refuse to grant relief in respect of a foreign non-main proceeding if such relief would interfere with the administration of a foreign main proceeding."

General consideration

50. Interventions were made favouring the establishment of a hierarchy between foreign representatives in the sense that a representative of a foreign main proceeding should have precedence over a representative of a foreign non-main proceeding and that, if need be, precedence should be established also among several foreign non-main representatives. Furthermore, it was said that a representative of a non-main proceeding (whose authority was typically restricted to the assets in the State where the non-main proceeding had been opened) should be able to obtain relief only insofar as it pertained to the assets covered by that proceeding. Thus, it was argued, the representative of a non-main proceeding should not be able to obtain relief covered by subparagraphs (a) and (b) (stay of actions and suspension of transfers of assets). Such representative would in normal circumstances only require information relating to the assets covered by the foreign non-main proceeding or would seek measures aimed at repatriating assets that were improperly removed from the State of the non-main proceeding.

51. In view of the above considerations, one of the suggestions made was that the article should envisage a restricted catalogue of relief for non-main proceedings as compared to main proceedings; in particular, the relief under paragraph (1) (a) and (b) should not be available to a representative of a foreign non-main proceeding. Another suggestion was that the article should express only the purpose of the granting of relief, without giving a list of relief available to different types of foreign representatives. A further suggestion was that the granting of relief under article 17 should be made subject to the requirements, limits and procedures of the law of the enacting State and that that idea should be expressed by adding at appropriate places words such as "under the conditions of the law of this State".

52. The last suggestion was objected to since it was implicit, by virtue of the discretionary nature of the relief under article 17, that the court would, in deciding whether to give relief and how broad should the relief be, have regard to its own law. Also, such a restriction was unnecessary in view of article 19, which permitted modification and termination of relief. In addition, the list of possible relief enumerated in subparagraphs (a) to (e) was a minimum list and the court should not be prevented from granting relief if that was found to be useful and fair. Furthermore, distinguishing relief on the basis of a distinction between main and non-main proceedings (or between more than one non-main proceeding) was not appropriate since the distinction was based more on the scope than on the quality of proceedings.

53. After exhaustive consideration, the Working Group reached the consensus that, indeed, the interests and the authority of a representative of a foreign non-main proceeding were typically narrower than the interests and the authority of a representative of a foreign main proceeding (who normally sought to gain control of all assets of the insolvent debtor). However, instead of differentiating the list of relief available to those representatives, it was considered preferable to express those differences by including a wording in the article that would make it clear that, in granting relief under article 17 to a representative of a foreign non-main proceeding, the court had to be satisfied

---

"[e] The enacting State may wish to consider the following alternative wording to replace subparagraph (f):

"(f) granting other relief that may be available under the laws of this State or the laws of the State where the foreign proceeding is taking place."

that the relief related to assets falling under the authority of that representative or that it concerned information required in the foreign non-main proceeding.

Subparagraph (a)

54. It was suggested that the measure granted under subparagraph (a) should not prevent a creditor from initiating an action to preserve a right and that the stay should be restricted to the enforcement of rights. It was also suggested that individual actions commenced before recognition should be allowed to continue. According to that view, a stay under the subparagraph might be in conflict with the fundamental right of each person to seek in courts the protection of its rights. That fundamental right, it was said, should be safeguarded in the context of article 17 as well as in the context of "automatic" stay under article 16 (see para. 22 above). The Working Group, however, adopted the view that the discretionary nature of the measure under the subparagraph, as well as the possibility to modify the measure under article 19, provided ample room to give effect to those concerns. Furthermore, the relief might be necessary to provide temporary respite to the foreign representative to organize the affairs of the debtor and not be distracted by having to participate in possibly numerous actions against the debtor.

Subparagraph (d)

55. It was agreed to add in subparagraph (d) a reference to information about the debtor's "affairs" or "business dealings" since access to such information, which was not expressly covered by the current wording, might be essential for carrying out the tasks for which the foreign representative was given authority.

Subparagraph (e)

56. It was agreed to permit expressly the court to sell the debtor's assets, a relief that was only implicitly covered by subparagraph (e). Such realization of assets might be necessary, for instance, as part of the continuing business activities of the debtor, or to pay the wages of employees.

Subparagraph (f)

57. Subparagraph (f) was considered by some to be too broad and open-ended in that it did not give an indication or limitation as to the kinds of other relief that could be granted under the article. One proposal was to make the list more focused by adding words such as "relating to administration, realization or distribution of assets"; another proposal was to broaden the list of relief enumerated in paragraph (1), which would make it possible to delete subparagraph (f). A further proposal was to restrict the relief to that available to the insolvency administrator in the enacting State. The Working Group adopted that last proposal.

Existence of local insolvency proceedings

58. It was considered that a pending insolvency proceeding in the enacting State should be an obstacle to granting relief to the foreign representative under article 17. In such a case, the foreign representative should be referred to the participation in the local proceeding, to requesting relief therein and to any assistance that might be available under article 21 (on cross-border judicial cooperation). It was proposed that the Model Provisions should expressly provide that relief of the types enumerated in article 17 should be available to the foreign representative in the context of the insolvency proceeding in the enacting State. The Working Group deferred the discussion of how to treat such concurrent proceedings to the consideration of chapter V (see paras. 185-200 below).

"Turnover" of assets to the foreign representative

59. The Working Group recalled its considerations regarding article 16 (3), which empowered the court to permit the foreign representative to realize and distribute assets located in the enacting State (see paras. 38-46 above). It was agreed that that type of relief was not automatic and that for that reason it should be included in article 17. The drafting group was entrusted with preparing a draft paragraph that expressed the idea that, before entrusting the foreign representative (or another person) with the distribution of assets, the court had to be satisfied that the interests of creditors in the enacting State were adequately protected.

Paragraph (2)

60. In view of the decision to provide a restrictive guideline for the granting of relief to foreign non-main proceedings (para. 53 above), the provision (currently referring to avoiding interference with a foreign main proceeding) was considered unnecessary.

61. It was suggested that, in granting relief under article 17, the court should also be admonished to prevent interference or disturbance of a proceeding in the enacting State. That point, however, was left to be taken into account in the discussion of concurrent proceedings under chapter V (see paras. 185-200 below).

"Paulian actions"

62. The Working Group considered the right of the foreign representative to initiate actions to reverse or render unenforceable legal acts detrimental to creditors (sometimes referred to as "Paulian actions"), on the basis of a new draft article suggested by the Secretariat (A/CN.9/WG.V/WP.48, note 2 to draft article 17) along the following lines:

> "A foreign representative has the right to initiate, under the conditions of the law of this State, an action to reverse or render unenforceable legal acts detrimental to all creditors."

63. Varying views were expressed as to the desirability of including a rule such as the one contained in the above-quoted provision. According to one view, the issue in question was of great complexity and would not lend itself to a harmonized solution within the framework of the draft Model Provisions. The prevailing view, however, was that a provision on the subject was needed in the draft Model Provisions. The right to commence actions to reverse or render unenforceable legal acts detrimental to all creditors was essential to protect the integrity of the assets of the debtor, in the interest of all creditors. Such right should not be denied to a foreign representative, as might be implied by the absence of an express provision on the subject. It was understood that the provision was intended to relate to the conferring of standing to bring actions and not to the creation of substantive rights.

64. The question was asked whether the phrase "under the conditions of the law of this State" referred to procedural rules of the enacting State governing those actions, or to the substantive law applicable to those actions. The view was expressed that the question of the applicable law to determine the requirements and other substantive rules for the commencement of those actions should be left for the rules on the conflict of laws of the enacting State.

65. The meaning of the words "reverse or render unenforceable" was found to be unclear and it was suggested to use instead the words "avoid or otherwise render ineffective", which were words used technically in a number of legal systems.

66. Regarding the scope of those actions, it was noted that in some legal systems the right to commence such actions might be provided in general rules and principles of law, such as the Civil Code, or might derive from specific statutory provisions of insolvency law. In the first case any affected creditor had the right to initiate those actions, while in the latter case that right was usually reserved in principle to the insolvency administrator. It was suggested

that the additional provision should refer only to actions that were available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State.

Article 18. Notice of recognition and relief granted upon recognition

67. The text of the article, as considered by the Working Group, read as follows:

> "[The foreign representative shall] [When the court recognizes a foreign main or non-main proceeding pursuant to article 13(3), it shall order the foreign representative to] give notice of the recognition, of the stay and suspension as provided in article 16(1) and of any relief granted under article 17(1) within __ days to all known creditors that have an address in this State. Such notice shall be given in the form required by the law of this State. [The obligation] [The order] to give notice does not suspend the effectiveness of the recognition or the relief."

68. The need for a specific provision on notice was questioned, and it was suggested that it might be sufficient to provide, similarly to articles 21 and 22 of the European Union Convention on Insolvency Proceedings, that the foreign representative had to comply with local publication procedures. In response it was noted that not all legal systems required notice of recognition of foreign proceedings and other court measures that followed recognition and that, therefore, a specific provision on the subject was necessary.

69. Reservations were expressed with regard to the scope of the notice requirements provided in article 18, which were found to be excessive. Various interventions were made in favour of limiting those requirements to providing notice of the recognition of the foreign proceeding and of the effects of that recognition, if required by local law. If local law also required notice to be given of any relief granted under article 17, or where the court found such notice to be necessary, the provision of such notice might still be ordered by the court, as a condition for granting the relief, pursuant to article 19(3).

70. Questions were asked as to who should bear the cost of the notice required to be given under article 18. In response it was said that that question should be left for the procedural rules of the enacting State and that nothing in article 18 prevented the court of the enacting State from ruling that the foreign representative should bear such costs.

71. The meaning of the last sentence of article 18 was found to be unclear and it was proposed to delete the sentence. In reply it was said that the last sentence of article 18 had been suggested so as to make it clear that the mandatory effects of the recognition, as well as any relief granted by the court under article 17, would be immediately operative and should not await the provision of notice to creditors and other interested parties under article 18. However, if article 18 was to be limited to requiring notice of the recognition, that sentence might no longer be needed.

Article 19. Protection of creditors and the debtor

72. The text of the article, as considered by the Working Group, read as follows:

> "(1) In granting or denying relief under [articles 15, 16 or 17] [this Law], the court must be satisfied that creditors collectively and the debtor are protected against undue prejudice and will be given a fair opportunity to assert their claims and defences.

"(2) Upon request of a person or entity affected by relief under articles 15, 16 or 17, the [competent] court may [deny,] modify or terminate such relief.

"(3) The court granting relief to the foreign representative may subject such relief to conditions it considers appropriate."

Paragraph (1)

73. Various objections were raised to the reference made to article 16 in paragraph (1). It was noted that article 16 dealt with mandatory effects of the recognition of a foreign main proceeding, and not with relief measures granted at the discretion of the court. It was noted that, as currently drafted, the provision expanded the discretion of the court of the enacting State in a manner that might not be acceptable to a number of legal systems and would not be conducive to greater legal certainty, which was one of the purposes of the draft Model Provisions.

74. Reservations were voiced with regard to the use in paragraph (1) of the words "undue prejudice", which were found to be of difficult interpretation in a number of legal systems. It was proposed that paragraph (1) should instead require the court of the enacting State to take into account the interests of all creditors, the debtor and other interested parties when granting relief under articles 15 and 17. In that connection, it was suggested that paragraph (1) should expressly refer to the protection of the interests of local creditors. One way of achieving that result might be to provide that the opening of a local proceeding would preclude granting relief under article 15 or 17 or terminate any relief previously granted by the court.

75. In response to that suggestion it was noted that such a provision would in fact prompt the opening of a local proceeding, a result which might not always be in the interests of all creditors, including local creditors. Besides, such a rule might require that the draft Model Provisions include a definition of local creditors, which would be difficult to formulate. As the purpose of article 19 was to ensure the protection of the interests of all creditors, without favouring any specific category, it was suggested that the proposed amendment should not be adopted.

Paragraph (2)

76. Objections were raised with regard to the possibility that the court of the enacting State might modify or terminate the mandatory effects of the recognition of a foreign main proceeding under article 16. Such a provision was found to be appropriate only in respect of discretionary relief granted under articles 15 and 17. General or ad hoc exceptions to article 16 should be dealt with within the context of that provision.

77. In response it was said that paragraph (2) was intended to provide persons that might be adversely affected by the stay or the suspension under article 16 (1) with an opportunity to be heard by the court of the enacting State. Such a safeguard was needed in the draft Model Provisions, so as to enable the court of the enacting State to deal with exceptional hardship situations, particularly in jurisdictions where no rule similar to article 16 (1) was in place. Furthermore, even in legal systems where the opening of insolvency proceedings produced the effects listed in article 16 (1), the courts were sometimes authorized to make individual exceptions upon request by the interested parties, under conditions prescribed by local law.

Paragraph (3)

78. It was suggested that paragraph (3) should be placed immediately after paragraph (1), so as to make it clear that the conditions referred to therein related to discretionary relief provided under articles 15 and 17, and not to modification or termination of relief under paragraph (2).

Article 20. Intervention by a foreign representative in actions in this State

79. The text of the article, as considered by the Working Group, read as follows:

"Upon recognition of a foreign proceeding, the foreign representative may intervene in actions in which the debtor is a [party][claimant or defendant] under the conditions of the law of this State."

80. It was said that, from the viewpoint of some national laws, the word "intervene" in the context of article 20 was unclear. In reply, it was stated that the word as used in the article did not present any difficulty of interpretation for other legal systems. The understanding was expressed that the purpose of the provision was to give the foreign representative standing to appear in court and to make representations in individual actions by the debtor against a third party or by a third party against the debtor. It was pointed out that many if not all national procedural laws contemplated cases where a party (the foreign representative in the current provision) who demonstrated a legal interest in the outcome of a dispute between two other parties was permitted by the court deciding the dispute to be heard in the proceedings. National procedural systems referred to such situations by different expressions, among which the expression "intervention" or similar expressions were frequent.

81. However, the view was also expressed that, for those legal systems where the words "to intervene" were not well understood, those words might be given a different interpretation, and in particular that they might carry the meaning that the foreign representative might substitute for the debtor in judicial actions. In response, it was emphasized that the words "to intervene", as used in article 20, did not mean "to substitute".

82. After consideration of the different views expressed, the Working Group agreed to retain the words "to intervene" and to include in the guide to enactment an explanation indicating that, if the enacting State used another expression for that concept, the use of such other expression in enacting article 20 would be appropriate.

83. With a view to clarifying the relation between articles 16 and 20, it was suggested that article 20 should limit the foreign representative's right to intervene in actions that had not been stayed under article 16(1). The suggested clarification was not adopted by the Working Group since it was considered self-evident.

84. It was also suggested that the right to intervene should be available only to the representative of a foreign main proceeding. The prevailing view, however, was that also the representative of a foreign non-main proceeding could have a legitimate interest in the outcome of a debtor's dispute between the debtor and a third party and that the provision should not exclude that possibility.

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

85. The text of the article, as considered by the Working Group, read as follows:

"(1) In matters referred to in article 1, courts of this State shall cooperate to the maximum extent possible with foreign courts and foreign representatives. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

"(2) In matters referred to in article 1, a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* shall, within its authority, cooperate to the maximum extent possible with foreign courts and foreign representatives. The *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is permitted, within its authority, to communicate directly with foreign courts or foreign representatives.

"(3) Cooperation may be implemented by any appropriate means, including:

"(a) appointment of a person to act at the direction of the court;

"(b) communication of information by any means deemed appropriate by the court;

"(c) coordination of the administration and supervision of the debtor's assets and affairs;

"(d) approval or implementation by courts of arrangements concerning the coordination of proceedings;

"(e) *[the enacting State may wish to list additional forms or examples of cooperation]*."

General consideration

86. Statements were made that judicial cooperation in general, including cooperation in insolvency matters, was governed by bilateral or multilateral treaties, which typically provided for cooperation based on reciprocity. For some States it was doubtful whether a workable framework for judicial cooperation could be established exclusively by way of a national statute, in particular since it was difficult to incorporate in it the concept of reciprocity. It was mentioned that, outside the framework of a treaty, a possible way of assuring a form of reciprocity was for a State to use the "annex X States" approach, a technique, also envisaged in footnotes "c" and "d" to article 16 (see para. 24 above), according to which cooperation was promised only with respect to courts from States that were listed in an annex to the national law governing cooperation.

87. The widely prevailing view, however, was that a provision such as the one contained in article 21 was useful since many States considered themselves in a position to provide in a national statute for a meaningful cross-border judicial cooperation, including cooperation in insolvency matters. To the extent such cooperation was based on principles of comity among nations, the enactment of the Model Provisions, including its article 21, offered an opportunity for making that principle more concrete and adapted to the particular circumstances of cross-border insolvencies.

88. In that connection it was recalled that the conclusion by the Working Group at its previous session was that the adoption of the Model Legislative Provisions by the Commission "would not exclude the possibility of undertaking work towards model treaty provisions or a convention on judicial cooperation in cross-border insolvency, if the Commission at a later stage so decided" (A/CN.9/433, para. 20).

89. The Working Group, having heard those views, proceeded to discuss article 21, recalled its earlier view that reciprocity was a concept to which no single solution could be easily provided (ibid., para. 19) and decided that the concept should not be addressed in the Model Provisions.

Paragraphs (1) and (2)

90. While it was accepted that the article should cover cooperation between courts as well as that between insolvency administrators, it was agreed that paragraphs (1) and (2) should make it clear that an insolvency administrator acted under the overall supervision of the competent court, the purpose of which was to ensure fairness, protection of creditor's interests and protection of confidential information. It was stressed, however, that any modification of the provision should not inadvertently suggest that ad hoc authorization would be needed for each act by the administrator, which would be contrary to practice.

91. In order to implement those considerations, it was suggested to state in paragraph (1) that the competent court in the enacting State should cooperate with foreign courts "either directly or through" an insolvency administrator. In addition, it was proposed that, in describing the limits of the administrator's authority in paragraph (2), the expression "within its authority" should be replaced by words such as "in the exercise of its functions and subject to supervision of the court".

Paragraph (3)

92. It was suggested to include in subparagraph (b) or at another appropriate place in the article a provision to the effect that cooperation and communication of information had to be "subject to the rules restricting the communication of information" (a proviso modelled on article 31 (1) of the European Union Convention on Insolvency Proceedings). The opposing view was that the duty to observe the confidentiality of information was one of various obligations to which cooperation was subject. Also, since the Model Provisions were not a self-contained set of rules, those obligations applied without being mentioned in the article. Thus it was preferable not to deal with those obligations in the article.

93. In subparagraph (c), the Working Group did not adopt the suggestion to split the provision into two, one dealing with the administration of the proceedings and the other with supervision of the proceedings. An observation was made that the provision of subparagraph (c) was different from the others in that it expressed the result to be achieved rather than the means to achieve it.

94. The Working Group decided to replace in subparagraph (d) the word "arrangement", considered to be unclear, with the word "agreement" or a similar term. A suggestion was made to include at the end of subparagraph (d) words along the lines of "realization of assets, payment of creditors' claims and other aspects of proceedings". Those words were said to be necessary to make it clear that, in order to achieve the purpose of article 23, it was necessary to coordinate the amounts paid to creditors and the timing of payments. No support was expressed for that suggestion.

Concurrent proceedings

95. A proposal was made to make express reference in paragraph (3) to instances of concurrent proceedings by including a new subparagraph (d bis) that might be along the lines of "coordination of multiple proceedings regarding the same debtor" or "coordination of main, non-main and local proceedings in respect of the same debtor". While support was expressed as to the substance of the proposal, it was said that the Model Provisions should treat more exhaustively various aspects of concurrent proceedings. The Working Group agreed to consider those matters in the context of its discussion of chapter V (see paras. 185-200 below). In addition, it was said that it would be desirable to include in article 21 criteria to guide the court in cooperating with foreign courts and representatives.

Article 23. Rate of payment of creditors

96. The text of the article, as presented to the Working Group, read as follows:

"Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding opened in another State may not receive a payment for the same claim in a proceeding opened in this State under *[... insert names of laws of the enacting State relating to insolvency]* with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding opened in this State is proportionately less than the payment the creditor has already received."

97. For lack of time, the Working Group did not discuss article 23 at the current session.

98. For further discussions relating to concurrent proceedings, see paragraphs 185-200 below.

PREAMBLE

99. The text of the preamble, as considered by the Working Group, read as follows:

"The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

"(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

"(b) greater legal certainty for trade and investment;

"(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested parties;

"(d) protection and maximization of the value of the debtor's assets; and

"(e) facilitation of the rescue of financially troubled businesses [, thereby protecting investment and preserving employment]."

100. The substance of the preamble was approved, subject to reference in subparagraph (c) also to the debtor as a party whose interests were to be protected and subject to retention of the words that were currently between the square brackets in subparagraph (e).

Chapter I. GENERAL PROVISIONS

Article 1. Scope of application

101. The text of the article, as considered by the Working Group, read as follows:

"This [Law] [Section] applies where:

"(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

"(b) assistance is sought in a foreign State in connection with a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*; or

"(c) a foreign proceeding and a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]* in respect of the same debtor are taking place concurrently; or

"(d) creditors or other interested parties in a foreign State have an interest in requesting the opening of or participating in a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*."

General considerations

102. Objections were voiced to retaining article 1 in its current form. It was noted that the article did not create any rights or obligations and merely listed situations regulated elsewhere in the draft Model Provisions. It was pointed out that, although intended to perform an explanatory function only, article 1 might be interpreted as limiting the scope of the remaining articles of the draft Model Provisions. Furthermore, it was considered to be unusual for a legislative text to define its own scope of application by providing examples of situations covered by its provisions. It was suggested that if an explanatory provision was needed at all in article 1, it would be preferable to formulate it in general terms, along the following lines: "This [Law] [Section] applies to situations of cross-border insolvency and related proceedings dealt with in the following articles." In response it was proposed to retain the current text of article 1, as some States might find it useful to provide such explanation of the scope of the draft Model Provisions. Those States that did not find the article necessary could eliminate it when implementing the Model Provisions.

103. It was suggested that the guide to enactment should explain the meaning of the word "assistance" as used in subparagraphs (a) and (b).

104. It was proposed to add a new subparagraph that would refer to the situation where creditors or other interested parties in the enacting State had an interest in requesting the opening of an insolvency proceeding in a foreign State or an interest in participating in such a proceeding. It was argued that, for the sake of completeness, that situation should be covered in article 1, since subparagraph (d) covered the "mirror" situation (viewed from the perspective of foreign creditors or other foreign interested parties).

105. It was suggested to include in subparagraph (b) the subjects who might seek assistance in a foreign State, so as to align the style of the subparagraph with subparagraph (a). Another suggestion was to delete subparagraph (b) since the rights of the creditors in the enacting State were dealt with in other bodies of law such as contract law and since it was not the function of the draft Model Provisions to touch upon or encourage the pursuit of those rights abroad. A further suggestion was that another situation possibly to be covered in the article was where, after the conclusion of the insolvency proceeding in a foreign State, assets pertaining to the debtor emerged in the enacting State and the foreign creditors sought to seize those assets. It was also proposed to delete subparagraph (d) since it either overlapped with subparagraph (a) or highlighted a principle that was already contained in national laws.

106. As the proposals for modification of the article did not attract sufficient support, the Working Group approved the substance of article 1.

Article 2. Definitions and rules of interpretation

107. The text of the article, as considered by the Working Group, read as follows:

"For the purposes of this Law:

"(a) 'foreign proceeding' means a collective judicial or administrative proceeding, including a proceeding opened on an interim basis, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

"(b) 'foreign main proceeding' means a proceeding taking place in the State where the debtor has the centre of its main interests;

"(c) 'foreign non-main proceeding' means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (g) of this article;

"(d) [(c)] 'opening of a foreign proceeding' is deemed to have taken place when the order opening the proceeding becomes effective, whether or not [final] [subject to appeal];]

"(e) [(b)] 'foreign representative' means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

"(f) [(d)] 'court' in reference to a foreign court means a judicial or other authority competent to carry out functions referred to in this Law;

"(g) [(e)] 'establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

General remarks

108. A suggestion was made to place article 2 before article 1, since the latter provision employed some of the terms defined in article 2. In response it was pointed out that in some legal systems a provision on the scope of application of a legislative text usually appeared before any other provision. In any event, enacting States remained free to reverse the order of articles 1 and 2.

109. It was pointed out that the word "insolvency", which was given a broad meaning in the draft Model Provisions, had a narrower connotation in some languages. It was thus suggested that a definition of "insolvency" should be included in article 2 or, alternatively, that a different word should be used in those languages. The Working Group felt that it would not be feasible to attempt to formulate a definition of "insolvency" and requested the secretariat to review the language versions of the draft Model Provisions so as to find appropriate wording in respect of those languages in which difficulties had been identified.

Subparagraph (a)

110. In response to questions concerning the need for a reference to interim proceedings in subparagraph (a), the Working Group reiterated its agreement that reference to those proceedings should be made in paragraph (a) (A/CN.9/433, paras. 38 and 39). It was agreed that the words "interim proceedings" should substitute for the words "proceeding opened on an interim basis".

111. It was suggested that the words "affairs of the debtor" were not sufficiently clear and that "affairs" should be qualified as being of a "financial" or "commercial" nature. In response it was noted that the adjective "financial" had a narrow meaning in a number of legal systems, as related to transactions with currency, securities or stocks in the financial market. Also the adjective "commercial", which was used in some legal systems to refer to transactions covered by a particular body of law sometimes referred to as "commercial law", might be interpreted as excluding certain categories of debtors whose transactions were not qualified as "commercial affairs" in those legal systems.

Subparagraph (d)

112. Noting that the draft Model Provisions also covered situations where the proceedings were commenced pursuant to a corporate act from which followed consequences determined by the law (ibid., para. 39), the Working Group referred subparagraph (d) to the drafting group to provide alternative language to the words "order opening the proceeding". (Subsequently, the drafting group suggested deletion of the subparagraph.)

Subparagraph (g)

113. In response to questions concerning the need for retaining the definition of "establishment" contained in subparagraph (g), it was recalled that the Working Group had previously agreed on the need for providing such definition (ibid., para. 41). One suggestion made to clarify subparagraph (g) was to delete the words "with human means and goods", as they might be interpreted as excluding certain enterprises such as those operating in a strictly electronic environment. Another suggestion was to define "establishment" as a place of operations other than the centre of the debtor's main interests. After consideration of those suggestions, the Working Group agreed on retaining the definition contained in subparagraph (g), which followed a similar definition provided in article 2(h) of the European Union Convention on Insolvency Proceedings.

Article 3. International obligations of this State

114. The text of the article, as considered by the Working Group, read as follows:

> "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail."

115. It was observed that cooperation between States, including cooperation between judicial bodies, was frequently addressed in bilateral or multilateral conventions and other forms of agreements binding States, such as diplomatic protocols or exchanges of diplomatic notes. It was also observed that, for example, article 13(6), which dispensed with the requirement of legalization of documents, or article 21, which allowed courts to communicate directly, might be overridden by international agreements that dealt with the legalization of documents or with communication between courts. It was suggested that, in order to avoid an unnecessarily broad effect of international agreements, it might be useful to provide expressly that the Model Provisions were overridden only where the treaty or convention in question regulated matters covered by the Model Provisions; another proposed solution was to provide that the Model Provisions did not alter international obligations of the enacting State in matters of cross-border insolvency.

116. While some support was expressed for modifying the article as suggested, one view was that the article should be deleted because it either stated what applied anyway or because it was not for a (model) national statute to deal with matters that concerned the hierarchy among legislative acts, an issue that had constitutional implications. Some proponents of that view suggested that the issue be explained in the guide to enactment.

117. Strong support was expressed for the deletion of the article. Nevertheless, in view of its usefulness for a number of States, it was decided to keep it for the time being.

Article 4. Competent [court] [authority][a]

118. The text of the article, as considered by the Working Group, read as follows:

> "The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts or authority competent to perform those functions in the enacting State]*."

119. It was agreed that the title of article 4 should read "competent authority", an expression which was found to be sufficiently broad to encompass also reference to the competent court of the enacting State.

120. The view was expressed that article 4 contained a definition of the competent authority and that, therefore, the provision should be moved to article 2. In reply it was noted that the provision in article 4 was not a mere definition, as it allowed the enacting State to indicate the authority competent to carry out the functions referred to in article 4. It was important to keep article 4 as a separate provision since it helped the foreign representative identify the authority to which he or she had to submit a request for recognition or cooperation.

121. For purposes of clarity, a suggestion was made to include in the article, after the words "foreign proceedings", the words "and of a foreign representative". The suggestion was not adopted, as it was considered that the recognition of a foreign representative was already covered by reference to the recognition of a foreign proceeding.

122. It was suggested to incorporate in the text of the article the reference to government-appointed officials or bodies who in some States exercised certain functions relating to insolvency proceedings, which was contained in the footnote to the current text. The view was expressed that, for purposes of clarity, inclusion of a reference to those officials in the text of the article was more appropriate than the negative formulation contained in the footnote. The prevailing view, however, was that reference to those officials should be retained in the footnote, as an option for those States to which the footnote applied, since a number of States did not have those categories of officials. In order to clarify the scope of the footnote, the guide to enactment should provide examples of the categories of government-appointed officials referred to in the footnote.

---

[a] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

> "Nothing in this Law affects the provisions in force in this State governing the authority of [*insert the designation of the government-appointed person or body]*".

Article 5. Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State

123. The text of the article, as considered by the Working Group, read as follows:

"A *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law."

124. The substance of article 5 was approved by the Working Group.

Article 6. Public policy exceptions

125. The text of the article, as considered by the Working Group, read as follows:

"Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be [manifestly] contrary to the public policy of this State."

126. The Working Group decided to delete the square brackets around the word "manifestly", so as to make it clear that the public policy exception was to be given a restrictive interpretation, as had been proposed at the twentieth session of the Working Group (A/CN.9/433, para. 160).

127. The Working Group was informed that some States, in enacting a public policy provision such as the one contained in article 6, might need to expressly construe the scope of such public policy exceptions as relating to fundamental principles of law, in particular the constitutional guarantees and individual rights.

128. A suggestion was made to redraft article 6 in a positive manner along the following lines: "The court may refuse to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State." The suggestion was objected to on the ground that the proposed wording might be interpreted as requiring the court to ascertain whether each individual request for relief or other action under the Model Provisions was not manifestly contrary to the public policy of the enacting State.

Chapter II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 7. Access of foreign representatives to courts in this State

129. The text of the article, as considered by the Working Group, read as follows:

"A foreign representative is entitled to apply directly to a competent court in this State for the purpose of obtaining any relief available under this Law."

130. There was general agreement in the Working Group that the purpose of the article was to allow direct access by the foreign representative to courts of the enacting State, thus freeing the foreign representative of formalities such as any diplomatic or consular channels. Views differed, however, as to whether such direct access applied only to the court referred to in article 4 or whether it covered also other courts that might be called upon to provide relief to the foreign representative (in particular in the context of article 15 dealing with pre-recognition relief).

131. According to one view, direct access should be restricted to the court referred to in article 4. It was said that providing direct access to all courts of the enacting State would be inconsistent with the scope of application of the Model Provisions, that it was unnecessary to include all courts of the enacting State under the preferential regime of article 7 and that such a broad rule might cause confusion when the foreign representative would be seeking relief in the enacting State.

132. Another view was that the article, while expressly providing direct access to the court specified in article 4, should make it clear that the Model Provisions did not deal with, or restrict, the right to obtain relief from other courts in the enacting State when that was possible under local law.

133. According to yet another view, which eventually prevailed, the article should be limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, without dealing with the competence of the courts or with relief that they could grant. It was pointed out that the foreign representative might have to apply for relief to a court other than the court referred to in article 4 (for example, when the competence of the court was determined according to the location of the asset with respect to which provisional relief was sought).

Article 8. Limited jurisdiction

134. The text of the article, as considered by the Working Group, read as follows:

> "The sole fact that a request pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the request."

135. The Working Group reaffirmed its position regarding that article, which had been expressed at its previous session (A/CN.9/433, paras. 69-70), and according to which the provision was a useful "safe conduct" rule aimed at ensuring that the court in the enacting State should not assume jurisdiction over the entire debtor's assets on the sole ground of the foreign representative having made an application for recognition of a foreign proceeding. The substance of the article was approved subject to replacing the expression "a request" by the words "an application".

136. However, it was noted that in a number of States the article was not necessary, since their rules on jurisdiction did not allow a court to assume jurisdiction over an applicant on the sole ground of the applicant's appearance before the court.

Article 9. Request by a foreign representative for opening of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

137. The text of the article, as considered by the Working Group, read as follows:

> "A foreign representative is entitled to request the opening of proceedings in this State under *[insert names of laws of the enacting State relating to insolvency]* if the conditions for opening such proceedings under the law of this State are met."

138. Interventions were made to suggest that the right to request the opening of insolvency proceedings should not be extended to a representative in a foreign non-main proceeding. It was pointed out that the opening of a proceeding might interfere with the administration of the main proceeding and that, in the interest of enhancing the cooperation and coordination in insolvency proceedings, only a representative in a foreign main proceeding should be granted that right.

139. However, pursuant to another view, which eventually prevailed, the proposed amendment should not be adopted, as it would render the article excessively rigid. In support of retaining the current wording, it was noted that a representative in a non-main proceeding might have a legitimate interest in requesting the opening of a proceeding in the enacting State, for instance, where no main proceeding within the meaning of the draft Model Provisions had been opened. Also, it was pointed out that the proposed limitation would not by itself avoid the opening of a local proceeding, since a representative in a non-main proceeding might easily circumvent the proposed rule by arranging for a creditor to submit the request for the opening of a local proceeding. Furthermore, it was noted that article 9 only gave standing to the foreign representative for making an application to the court, so that a request for the opening of a local proceeding would still need to be considered on its own merits.

140. The Working Group discussed at length the question whether the foreign representative's right to request the opening of insolvency proceedings in the enacting State should depend on recognition of the foreign proceeding.

141. Various interventions were made in favour of giving the foreign representative that right without requiring prior recognition. It was pointed out that, in practice, a request for the opening of a local insolvency proceeding might typically come into consideration at the initial stages of the foreign insolvency proceeding, often to secure control over the assets of the debtor. In such emergency situations, the foreign representative might not yet be in a position to comply with all the requirements of the enacting State for recognition of his or her status. Although article 13 represented an improvement to the existing system, in some jurisdictions the recognition might entail some delay and might not be available at the time needed by the foreign representative.

142. However, strong support was expressed for making the recognition of the foreign representative a necessary condition for the right to request the opening of insolvency proceedings in the enacting State. It was stated that an alleged urgent need for preserving the assets of the debtor did not constitute sufficient reason for giving the foreign representative the right to request the opening of insolvency proceedings prior to recognition. Article 15 already dealt with emergency situations by authorizing the court to grant provisional relief upon application for recognition.

143. It was further noted that the recognition was the procedure whereby the foreign representative was given standing before the courts of the enacting State for the purposes of the draft Model Provisions. Accordingly, the relief under article 16 was only available upon recognition, and the provisional relief provided in article 15 required at least the filing of an application for recognition. Thus, waiving the requirement of prior recognition in article 9 would bring that article into conflict with those other articles of the draft Model Provisions. Also, it would not be logical to allow a foreign representative not yet recognized as such in the enacting State to request the opening of local proceedings under article 9, while at the same time requiring prior recognition for the foreign representative's right to participate in existing proceedings under article 10.

144. In the course of the discussion, a number of suggestions were made so as to achieve a compromise between the two conflicting views expressed in the Working Group. One proposal was to waive the requirement for prior recognition in article 9, while providing that the foreign representative had to provide proof, satisfactory to the court, of his or her status in the State where the proceeding had originated. However, reservations were expressed to that proposal, which was held to establish an undesirable double system of recognition: a provisional recognition limited to the purposes of article 9, and full-fledged recognition for all other purposes of the draft Model Provisions. It was noted that article 13 provided minimum essential requirements for the recognition of a foreign representative and that it would not be appropriate to lower those standards for the purposes of article 9.

145. Another proposal was that article 9 should be redrafted to the effect that, provided adequate proof of the status of the foreign representative was given to the court, the foreign representative could request the recognition of a foreign proceeding or request the opening of a local proceeding, when no local proceeding already existed in respect of the debtor. That proposal, however, was considered to be excessively complex for the limited purpose of the article and did not attract sufficient support.

146. After considering all the views expressed and proposals made, and noting the lack of a consensus on the subject, the Working Group decided to insert the words "upon recognition," within square brackets at the beginning of article 9.

Article 10. Participation of a foreign representative in a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

147. The text of the article, as considered by the Working Group, read as follows:

> "Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding concerning the debtor in this State under *[insert names of laws of the enacting State relating to insolvency]*."

148. A suggestion was made to restrict the right of participation of representatives of foreign non-main proceedings to cases where the participation in the insolvency proceeding in the enacting State "relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding", the formulation proposed to be included in article 17 (see para. 53 above). The suggestion was not adopted since it would be difficult, or inappropriate, to link proposals of the foreign representative to particular assets.

149. The expression "to participate" was criticized as being unclear and not specifying which actions were covered by it. It was proposed to replace the expression "to participate" by the words "to intervene", which were used in article 20 to refer to the appearance by the foreign representative in individual actions brought by the debtor or against the debtor (see para. 79 above). The proposal was not adopted on the ground that the situation in article 10 (a collective insolvency proceeding) was fundamentally different from that of article 20 (individual action by or against the debtor); it was said that, because of the difference in the conditions for, and the nature of, the foreign representative's appearance in the two situations, the use of the same expression would be confusing.

150. According to one view the provision could be made clearer if, instead of (or in addition to) the expression "to participate", language were used along the lines of "to be heard in an insolvency proceeding and to make proposals therein". That proposal was supported on the condition that the ways of participation in the proceedings were not listed exhaustively. However, the prevailing view was that the expression "to participate" should be retained, since it captured in a flexible way the various purposes for which the foreign representative might appear in an insolvency

proceeding in the enacting State. It was considered that the guide to enactment should explain that, in enacting the article, the expression "participate" might have to be replaced by an expression which in that national law best expressed the intended meaning.

Article 11. Access of foreign creditors to a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

151. The text of the article, as considered by the Working Group, read as follows:

"(1) Subject to paragraph (2), foreign creditors have the same rights regarding the opening of, and participation in, a proceeding in this State under *[insert names of laws of the enacting State relating to insolvency]* as creditors [that are citizens of this State or are resident, domiciled or have a registered office] in this state.

"(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[insert names of laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than general (non-priority or non-preference) claims.[b]"

152. The view was expressed that the words "foreign creditors", as used in paragraph (1), were unclear, and that criteria (such as nationality or domicile) were needed for establishing who would be regarded as a foreign creditor. As it was not realistic to attempt to formulate a uniform definition of those criteria, it was suggested to redraft paragraph (1) to the effect that all creditors should be treated in the same manner, without discrimination based on nationality or other grounds, except as provided in paragraph (2). In response it was pointed out that the reference to the same rights "regarding the opening of, and participation in, a proceeding" were needed so as to circumscribe the scope of the equal treatment under paragraph (1). It was, however, proposed that the words in square brackets in paragraph (1) were not needed and should be deleted.

153. In respect of paragraph (2), it was pointed out that in some legal systems the payment of certain categories of claims (such as fines and other pecuniary sanctions, or claims whose payment was deferred) were ranked lower than unsecured non-priority claims. It was suggested that paragraph (2), which placed foreign claims on equal footing with local non-priority claims, should be redrafted so as to make it clear that foreign claims would not receive better treatment than those local claims whose payment was deferred.

"[b] The enacting State may wish to consider the following alternative wording to replace article 11(2):

"(2) The provision in paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[insert names of laws of the enacting State relating to insolvency]* and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than general (non-priority or non-preference) claims."

154. The word "general" in paragraph (2) was found to be unnecessary. It was suggested that it might be sufficient to refer to "non-priority or non-preference claims". The Working Group agreed to delete the word "general" as well as the parenthesis around the words "non-priority or non-preference".

155. It was noted that foreign tax and social security claims were not expressly excluded from the ambit of paragraph (2). Thus, strong support was expressed for retaining the option contained in the footnote, since a number of jurisdictions would have difficulties in enacting the Model Provisions if they did not expressly reserve the possibility for the enacting State to exclude foreign tax and social security claims.

156. The view was expressed that the article should confine itself to affirming the principle that, subject to the priorities of the law of the enacting State, all creditors should be granted the same rights irrespective of nationality, residence or domicile.

Article 12. Notification to foreign creditors of a proceeding under *[insert names of laws of the enacting State relating to insolvency]*

157. The text of the article, as considered by the Working Group, read as follows:

"(1) Whenever a notification of commencement of proceedings under *[insert names of laws of the enacting State relating to insolvency]* is required under the law of this State for creditors in this State, such notification shall be made to known creditors not resident, domiciled or with a registered office in this State.

"(2) Notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

"(3) The notification shall:

"(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

"(b) indicate whether secured creditors need to file their secured claims; and

"(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court."

General remarks

158. The view was expressed that, for the sake of consistency, the same meaning should be given to the notion of "foreign creditor" in articles 11 and 12. In response it was said that articles 11 and 12 had different purposes and that the Working Group was following a pragmatic approach by not providing a definition of "foreign creditors" and by dealing with that notion, in the few instances where it was mentioned, within the specific context of the provision to which it related.

Paragraph (1)

159. It was noted that one of the main purposes of the notification requirements under article 12 was to inform creditors of the time limit to file their claims and the form in which claims had to be filed. However, in many cases the deadline for filing claims was not established upon commencement of the proceedings, but at a later stage.

Therefore, it was proposed that, instead of requiring notification of commencement of the proceedings, paragraph (1) should require notification of foreign creditors whenever the law of the enacting State required notification to be given to all creditors.

160. As regards the foreign creditors that had to be given notification pursuant to paragraph (1), the Working Group considered whether such notification was to be given to known creditors "not resident, domiciled or with a registered office" in the enacting State, as currently provided in paragraph (1), or to known creditors "without an address" in the enacting State. In favour of retaining the wording of paragraph (1) it was stated that the word "address" was not a legal concept and could encompass even a seasonal or transitory location. The notions of "residence", "domicile" or "registered office", in turn, were known to a number of legal systems, which would facilitate the application of paragraph (1) by the court of the enacting State. The prevailing view, however, was that the current formulation of paragraph (1) was excessively rigid and would expose the court of the enacting State to arguments as to whether foreign creditors had their "residences", "domiciles" or "registered offices" at the addresses identified by the court. Therefore, it was held preferable to refer in paragraph (1) to known creditors "without an address in this State".

Paragraph (2)

161. It was pointed out that debtors' records were often incomplete or deficient and that, in practice, it was often difficult to establish, solely on the basis of the documentation in the insolvency proceeding, a complete list of creditors. Thus, in some jurisdictions attempts were made, through advertisement or other publication procedures, to reach also other creditors not yet known to the court or the insolvency administrator. Since paragraph (1) only referred to notifications to known creditors without an address in the enacting State, it was suggested that paragraph (2) should contain language that contemplated attempts to reach also unknown creditors, through the form of notification deemed appropriate by the court, when the cost of such attempts did not unreasonably burden the proceedings.

Paragraph (3)

162. As a result of the changes that had been approved to paragraph (1), it was proposed to amend paragraph (3) so as to clarify that the information referred to therein was required only for the initial notification issued to foreign creditors.

163. It was noted that, in some legal systems, a secured creditor who filed a claim in an insolvency proceeding might be deemed to have waived the security or some of the privileges attached to the credit. Thus, it was suggested that paragraph (3) (b) should require information to be provided as to whether a secured creditor jeopardized its security by filing the claim. In response it was said that it would be sufficient for the guide to enactment to refer to that possibility, indicating that enacting States where those situations might arise might wish to include information as to the effects of filing claims by secured creditors in the notification to be given pursuant to paragraph (3).

164. A suggestion was made to expand the information required to be contained in the notification, so as to include information on the total value of the debts and assets of the debtor. That proposal did not attract sufficient support, since it was considered that such information might not always be available at the time of commencement of the proceeding. However, nothing in the draft Model Provisions prevented the court of the enacting State from providing such information, where it was available.

Article 13. Recognition of a foreign proceeding for the purpose of obtaining relief

165. The text of the article, as considered by the Working Group, read as follows:

"(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

"(2) An application for recognition shall be accompanied by:

"(a) the duly authenticated decision [or decisions] opening the foreign proceeding and appointing the foreign representative; or

"(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

"(c) in the absence of proof referred to in subparagraphs (a) and (b), any other proof acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

"(3) Subject to article 14, the foreign proceeding shall be recognized

"(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

"(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2 (g) in the foreign State.

"(4) Absent proof to the contrary, the registered seat of the debtor is deemed to be the centre of its main interests.

"(5) If the decision or certificate referred to in paragraph (2) indicates that the foreign proceeding is a proceeding as defined in article 2 (a) and that the foreign representative has been appointed within the meaning of article 2 (e), the court is entitled to so presume.

"(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

"(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

"[(8) An application for recognition of a foreign proceeding shall be decided upon expeditiously]."

General remarks

166. It was agreed to change the title of article 13 to read "Recognition of a foreign proceeding and of a foreign representative". It was also agreed that, at least in the English text, the word "proof" should be replaced by the word "evidence".

167. It was suggested to extend the right to apply for recognition of a foreign proceeding to creditors in the enacting State, since they might have an interest in establishing a channel of cooperation between the court of the enacting State and the court of the foreign main proceeding, rather than simply filing their claims abroad, particularly in cases where the assets of the debtor in the enacting State were not sufficient for the payment of local claims. In response it was noted that the recognition of the foreign proceeding was not an adequate solution for such a situation, since the recognition was not conceived as a mechanism for securing cooperation and access by the local creditors to the foreign proceeding, a matter which was dealt with by articles 11 and 21.

Paragraph (2)

168. It was suggested that the foreign representative should be required to submit evidence that enabled the court to establish whether the proceeding for which recognition was sought was a main proceeding or a non-main proceeding. The countervailing view, however, was that such a provision was not needed, since it would be in the foreign representative's own interest to supply the court with all the necessary evidence in order to expedite the recognition procedures. In any event, if the Working Group decided to adopt the proposal, it would be necessary to consider what would be the appropriate place to insert it, since paragraph (2) contained alternative provisions. Also, the Working Group would need to consider what form of evidence should be required for that purpose. For lack of time, the Working Group did not reach a conclusion on that matter.

169. It was agreed that the guide to enactment should explain that the words "duly authenticated", if retained, in paragraph (2) (a) did not mean that the foreign decision was subject to legalization procedures of the type referred to in paragraph (6).

Paragraph (4)

170. For purposes of consistency with the wording used in the European Union Convention on Insolvency Proceedings, it was suggested to use the expression "registered office" rather than "registered seat". Also, with a view to clarifying that paragraph (4) also covered insolvencies of individuals, it was proposed to redraft paragraph (4) to provide that, absent proof to the contrary, the registered office was deemed to be the centre of the main interests of a legal entity, and the habitual residence was deemed to be the centre of the main interests of an individual.

Paragraph (5)

171. Questions were raised as to the need for paragraph (5), since that provision was not intended to be binding upon the recognizing court. In reply it was noted that in some jurisdictions it was useful to expressly enable the court to make decisions based on the presumptions established by paragraph (5), so as to avoid litigation or obviate the need for lengthy arguments as to the nature of the foreign proceeding and the appointment of the foreign representative.

Paragraph (6)

172. The paragraph received strong support. However, a view was expressed that it would go too far if even in exceptional circumstances no legalization would be required.

Paragraph (8)

173. It was agreed to delete the square brackets around paragraph (8) and to replace the word "expeditiously" by the words "at the earliest possible time".

Article 14. Grounds for refusing recognition

174. The text of the article, as considered by the Working Group, read as follows:

"Recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

"(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(e); or

"[(b) the debtor is a *[insert the designations of specially regulated financial services institutions]*, if the debtor's insolvency in this State is subject to special regulation in *[insert names of laws of the enacting State relating to insolvency of such institutions]*]."

175. It was widely considered that the word "only" in the chapeau of the article was inappropriate since other grounds for refusal of recognition were to be included in the Model Provisions or were already mentioned in the Model Provisions (article 6 on public policy). The view was expressed that the word "only" should be retained and any grounds for refusal or recognition should be listed or referenced in article 14.

176. Various proposals were made for inclusion of other grounds for refusal of recognition. Those grounds were: the existence of a (main) proceeding in the enacting State or prior recognition in the enacting State of a foreign main proceeding that had been opened in a third State; insufficiency of evidence submitted in support of the request for recognition, or non-compliance with other requirements set out in article 13; the fact that the foreign non-main proceeding had been commenced in a State where the debtor had assets but no establishment as defined in article 2(g); the foreign proceeding was one concerning a consumer as opposed to a commercial person or entity; and the need to protect the interests of creditors in the enacting State. Opposition was expressed with regard to including open-ended general grounds since article 6 on public policy already offered a sufficiently broad scope for refusal of recognition.

177. A view was expressed that, as an alternative to the enumeration of the grounds on which recognition might be refused, the Model Provisions could contain a definition of the effects limited to coordination and cooperation, to be granted to the recognized foreign proceeding when a local proceeding is already pending in the enacting State. Strong objections were raised against that view.

178. It was observed that, if the existence of a proceeding in the enacting State was to be included as a reason for refusing recognition of a foreign proceeding, that would be in conflict with article 10, which allowed the foreign representative to participate in the proceeding in the enacting State only upon recognition of a foreign proceeding. It was understood that the provisions of article 14 would be drafted in harmony with the provisions of article 10.

179. It was noted that subparagraph (b) provided that recognition could be refused where the debtor was a financial services institution such as a bank if the particular insolvency was subject to special regulation in the enacting State. It was, however, suggested that cross-border aspects of insolvencies of such institutions should be excluded from the ambit of the Model Provisions altogether. One reason was that cross-border insolvencies of banks raised particular problems that were currently not dealt with, or were not dealt with adequately, in the Model Provisions. Furthermore, those problems were currently studied in other forums and it was suggested that it was therefore premature to include them in the ambit of the Model Provisions prior to a conclusion being reached in those other forums. It was also suggested that cross-border insolvencies of insurance companies gave rise to special regulatory concerns and that

therefore those insolvencies too should not be governed by the Model Provisions. The Working Group agreed with those suggestions.

Chapter V. CONCURRENT PROCEEDINGS

Article 22. Concurrent proceedings

180. The text of the article, as considered by the Working Group, read as follows:

"(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to open a proceeding in this State against the debtor under *[insert names of laws of the enacting State relating to insolvency]* only if the debtor has [an establishment] [or assets] in this State[, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of this State].

"(2) Recognition of a foreign insolvency proceeding is, for the purposes of opening proceedings in this State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent."

Paragraph (1)

181. There was general agreement in the Working Group that, in the situation dealt with in paragraph (1), the court of the enacting State should be able to open an insolvency proceeding not only when the debtor had an establishment in the enacting State but also when it had assets in that State. That solution was considered realistic in view of the fact that a number of States currently allowed the opening of such insolvency proceedings based on the presence of assets in the State. The solution was supported also on the ground that the foreign representative who believed that opening of a local insolvency proceeding was in the best interest of creditors should not face jurisdictional obstacles when requesting the opening of such a proceeding.

182. After the Working Group adopted that solution, it was suggested that, if the presence of assets in the enacting State was sufficient for opening local insolvency proceedings, paragraph (1) could be deleted. That suggestion was opposed on the ground that the provision was still useful as an indication that grounds for jurisdiction other than the presence of assets were not sufficient, and because the paragraph also provided a solution as to the effects of a proceeding opened in the enacting State after recognition of a foreign main proceeding.

183. Support was expressed for the solution in paragraph (1), according to which, after recognition of a foreign main proceeding, the effect of the proceeding opened in the enacting State was to be restricted to the territory of the enacting State.

Paragraph (2)

184. The Working Group approved the substance of paragraph (2).

B. Consideration of principles underlying possible new provisions on concurrent proceedings

185. It was noted that chapter V, "Concurrent proceedings" (arts. 21 and 22), did not deal with a number of issues relating to a situation where, in addition to a foreign insolvency proceeding, an insolvency proceeding had been or might be opened in the enacting State. The Working Group engaged in a discussion of principles that should be taken into account in the formulation of provisions on concurrent proceedings.

Principle 1

186. The Working Group discussed the following principle:

"1. There can only be one main proceeding. The court shall decide which proceeding is the main proceeding."

187. While there was agreement on the principle, it was observed that the objective of the principle might not always be achieved, in particular where both the foreign court and the court in the enacting State decided that the proceedings opened in their respective States were main proceedings. It was considered that in such a case the court of the enacting State should treat the foreign proceeding as a non-main proceeding and would cooperate with the foreign court accordingly.

Principle 2

188. The Working Group discussed the following principle:

"2. The recognition of a foreign proceeding shall not restrict the right to commence a local proceeding."

189. It was noted that article 22 covered that principle.

Principle 3

190. The Working Group discussed the following principle:

"3. A local proceeding shall prevail over the effects of recognition of a foreign proceeding and over relief granted to a foreign representative."

191. Support was expressed for the principle. It was said that, once a local proceeding was opened, the effects of the recognized foreign proceeding should be reassessed and should be adjusted or terminated in such a way that they did not disturb the administration of the debtor's assets in the enacting State. It was stressed that the provision relating to such adjustment or termination should be flexible enough so as to make it possible to take into consideration factors such as fairness, the need to coordinate concurrent proceedings, acquired rights, the disturbance caused by preventing approved actions from being carried out and the general principle of leaving in place measures that did not disturb the proceeding in the enacting State. A related proposal was to specify in the Model Provisions which relief granted for the benefit of the foreign proceeding (or which effect of recognition of the foreign proceeding) should or could be displaced as a result of the opening of the local proceeding. However, it was also observed that the

adoption of the principle without due regard to whether the local proceeding was a main or non-main proceeding would conflict with a long-standing approach of particularly common-law countries to that issue.

Principle 4

192. The Working Group discussed the following principle:

"4. When there are two or more proceedings, there shall be cooperation and coordination."

193. The Working Group endorsed the principle and noted that it was covered by article 21.

Principle 5

194. The Working Groups discussed the following principle:

"5. Coordination may include granting relief to the foreign representative. In granting relief to a foreign representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative."

195. The view was expressed that, in order to obtain cooperation under article 21, the foreign representative should apply for recognition of the foreign proceeding. That meant, it was said, that the Model Provisions should distinguish between recognition for the purpose of obtaining cooperation and coordination under article 21 and recognition for the purpose of obtaining relief or effects pursuant to articles 10, 16, 17 and 20. It was further said that cooperation between two concurrent proceedings would be refused when recognition of the foreign proceeding was refused; it was added that the existence of a proceeding in the enacting State should be one ground for refusal of recognition.

196. Wide opposition was expressed against that view. It was stressed that recognition should be required only for obtaining relief or effects pursuant to articles 10, 16, 17 and 20 and that, in particular, no formal recognition was needed to obtain cooperation under article 21. Such a requirement would run counter the current practice, pursuant to which judicial cooperation, when granted, was granted without prior recognition. Views were expressed that it would be undesirable and overly complicated to introduce two types of recognition, one for the purposes of cooperation and one for other purposes.

Principle 6

197. The Working Group discussed the following principle:

"6. Creditors shall be allowed to file claims in any proceeding. Payments to creditors from multiple proceedings shall be equalized."

198. The Working Group endorsed the principle and noted that it was covered by articles 11 and 23.

Principle 7

199. The Working Group discussed the following principle:

"7. If there are surplus proceeds of a local non-main proceeding, they shall be transferred to the main proceeding."

200. The Working Group was in agreement with the principle.

* * *

ANNEX

Draft UNCITRAL Model Legislative Provisions on
Cross-Border Insolvency

(Note: The draft articles contained in this annex were prepared pursuant to the deliberations of the Working Group at the current session. However, for lack of time, these draft articles were not reviewed by the Working Group during the session. The preamble and draft articles 1 to 11 and 15 to 21 were prepared by an informal drafting group, which, pursuant to a decision of the Working Group, met during the session. Draft articles 12 to 14 and 22 were prepared by the Secretariat. Draft article 23 was, for lack of time, not considered at the session.)

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor's assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

Chapter I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This [Law] [Section] applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*; or

(c) a foreign proceeding and a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested parties in a foreign State have an interest in requesting the commencement of or participating in a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*.

(2) This [Law][Section] does not apply where the debtor is a *[insert the designations of specially regulated financial services institutions such as banks and insurance companies]*, if the debtor's insolvency in this State is subject to special regulation.

Article 2. Definitions

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. Competent authority[a]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts or authority competent to perform those functions in the enacting State]*.

Article 5. Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State

A *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.

Article 6. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Chapter II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 7. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

---

[a] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in this State governing the authority of *[insert the designation of the government-appointed person or body]*.

Article 8. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 9. Application by a foreign representative to commence a proceeding under *[identify laws of the enacting State relating to insolvency]*

[Upon recognition,] a foreign representative may apply to commence a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* if the conditions for commencing such a proceeding under the law of this State are otherwise met.

Article 10. Participation of a foreign representative in a proceeding under *[identify laws of the enacting State relating to insolvency]*

Upon recognition of a foreign proceeding, the foreign representative may participate in a proceeding concerning the debtor in this State under *[identify laws of the enacting State relating to insolvency]*.

Article 11. Access of foreign creditors to a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims]*.[b]

---

[b] The enacting State may wish to consider the following alternative wording to replace article 11 (2):

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]* and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims]*.

Article 12. Notification to foreign creditors of a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have an address in this State. [The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.]

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

Chapter III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 13. Recognition of a foreign proceeding and of a foreign representative

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(4) Absent proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is deemed to be the centre of the debtor's main interests.

(5) If the decision or certificate referred to in paragraph (2) of this article indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(d), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

(8) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

Article 14. Grounds for refusing recognition

[Subject to article 6,] recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(d); or

(b) ...*

Article 15. Relief upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where necessary to protect the assets of the debtor or the interests of the creditors, grant any relief mentioned in article 17.

(2) *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice].*

(3) Unless extended under article 17(1)(c), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

---

* Subparagraph (b) would be the appropriate location for including any additional ground for refusing to recognize a foreign proceeding, should the Commission so decide.

Article 16. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,

(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities are stayed;

(b) the right to transfer, dispose of or encumber any assets of the debtor are suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) of this article is subject to *[refer to any exceptions or limitations that are applicable under laws of the enacting State relating to insolvency]*.

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings, to the extent this is necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

[(5) This article does not apply if, at the time of application for recognition, a proceeding is pending concerning the debtor under *[identify laws of the enacting State relating to insolvency]*.]

Article 17. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, at the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 16(1)(a);

(b) suspending the right to transfer, dispose of or encumber any assets of the debtor to the extent they have not been suspended under article 16(1)(b);

(c) extending relief granted under article 15;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration and realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) granting any additional relief that may be available to *[insert the title of a person or body administering a liquidation or reorganization under the law of the enacting State]* under the laws of this State.

(2) Upon recognition of a foreign main or non-main proceeding, the court may entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding.

Article 18. Notice of recognition and relief granted upon recognition

Notice of recognition of a foreign proceeding [and of the effects of recognition of a foreign main proceeding under article 16] shall be given in accordance with *[the procedural rules governing notice of [the commencement of] a proceeding under the insolvency laws of this State]*.

Article 19. Protection of creditors and other interested persons

(1) In granting or denying relief under article 15 or 17, and in modifying or terminating relief under this article, the court [shall take into account the interests of the creditors and other interested persons, including the debtor] [must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected].

(2) The court may subject such relief to conditions it considers appropriate.

(3) Upon request of a person or entity affected by relief granted under article 15 or 17, [or by the stay or suspension pursuant to article 16(1)], the court may modify or terminate such relief [, stay or suspension] [, taking into account the interests of the creditors and other interested persons, including the debtor].

Article 19 bis. Actions to avoid acts detrimental to creditors

Upon recognition of a foreign proceeding, the foreign representative [is permitted] [has standing] to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State]*.

Article 20. Intervention by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in [individual actions] [proceedings] in which the debtor is a [claimant or defendant] [party].

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, a court referred to in article 4 shall cooperate to the maximum extent possible with foreign courts, either directly or through a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* or a foreign representative. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* shall, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives. The *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is permitted, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means deemed appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) [coordination of multiple proceedings regarding the same debtor] [coordination of main or non-main foreign proceedings and a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor;

(f) *[the enacting State may wish to list additional forms or examples of cooperation]*.

Article 22. Concurrent proceedings

(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to commence a proceeding in this State against the debtor under *[identify laws of the enacting State relating to insolvency]* only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor situated in the territory of this State.

(2) Recognition of a foreign insolvency proceeding is, for the purposes of commencing a proceeding in this State referred to in paragraph (1) of this article and in the absence of evidence to the contrary, proof that the debtor is insolvent.

Article 23. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part

payment in respect of its claim in an insolvency proceeding commenced in another State may not receive a payment for the same claim in a proceeding commenced in this State under *[identify laws of the enacting State relating to insolvency]* with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding commenced in this State is proportionately less than the payment the creditor has already received.

* * *

123

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/436
16 April 1997

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Thirtieth session
Vienna, 12-30 May 1997

Draft Guide to Enactment of the UNCITRAL Model Legislative Provisions on Cross-Border Insolvency

Note by the Secretariat

Contents

		Page
I.	PURPOSE OF THIS GUIDE	2
II.	BACKGROUND AND PURPOSE OF MODEL PROVISIONS	2
III.	MAIN FEATURES OF MODEL PROVISIONS	4
	A. Model Provisions fitting into existing national law	4
	B. Scope of application of Model Provisions	5
	C. Types of foreign proceedings covered	5
	D. Foreign assistance for insolvency proceedings taking place in the enacting State	6
	E. Foreign representative's access to courts of the enacting State	6
	F. Recognition of foreign proceedings	7
	G. Cross-border cooperation	8
	H. Concurrent proceedings	9
IV.	ARTICLE-BY-ARTICLE REMARKS	9
V.	ASSISTANCE FROM THE UNCITRAL SECRETARIAT	29

I. PURPOSE OF THIS GUIDE

1. In preparing this Guide to Enactment, the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the *UNCITRAL Model Legislative Provisions on Cross-Border Insolvency* would be a more effective tool for modernizing international aspects of insolvency law if background and explanatory information were provided to executive branches of Governments and legislators using the Model Provisions in preparing the necessary legislative revisions. Such information might assist States also in considering which, if any, of the provisions should be varied in order to be adapted to the particular national circumstances.

2. The present Guide to Enactment was adopted by the Commission [...].

II. BACKGROUND AND PURPOSE OF MODEL PROVISIONS

3. The Model Provisions were adopted to assist States (herein referred to as "enacting States") to formulate a modern, harmonized and fair legislative framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where among the creditors of the debtor there are some that are not from the State where the insolvency proceeding is taking place.

4. The Model Provisions offer an opportunity for States to adopt certain modern, internationally-accepted practices into their law. The Model Provisions represent a universal consensus on certain practices in insolvency matters that are characteristic of modern, efficient insolvency systems, and therefore offer an opportunity for introducing some useful additions and improvements as well as uniformity into the insolvency regimes of the enacting States. Jurisdictions that will find the Model Provisions useful include those that have had to deal with numerous cases of cross-border insolvency as well as those that wish to be well prepared for them.

5. The Model Provisions respect the differences among national procedural laws and do not attempt a substantive unification of insolvency law. They offer solutions that help in several modest, but nonetheless significant ways; those include:

- providing access for the person administering a foreign insolvency proceeding ("foreign representative") to the courts of the enacting State, thereby permitting the foreign representative to petition the courts of the enacting State for a temporary "breathing space", to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

- determining when a foreign insolvency proceeding should be accorded "recognition", and what the consequences of recognition may be;

- providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

- permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

- authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

- providing for court jurisdiction and facilitating coordination in cases of concurrent insolvency proceedings.

6. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. National insolvency laws have by and large not kept pace with the trend, in that they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the insolvent debtor's assets against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cases of cross-border insolvency impedes capital flows and is a disincentive to cross-border investment.

7. Only a limited number of countries have a legislative framework for dealing with cross-border insolvency that is well suited to the needs of international trade. Various techniques and notions are employed in the absence of a specific legislative or treaty framework for dealing with cross-border insolvency. Those include: application of the doctrine of comity by courts in common-law jurisdictions; issuance for equivalent purposes of enabling orders (*exequatur*) in civil law jurisdictions; and enforcement of foreign insolvency orders relying on legislation on enforcement of foreign judgments as well as through techniques, such as letters rogatory.

8. Approaches based purely on the doctrine of comity or on the *exequatur* do not provide the same degree of predictability and reliability as would a specific legislative framework for judicial cooperation, recognition of foreign insolvency proceedings and access for foreign representatives to courts. For example, general legislation on reciprocal recognition of judgments, including *exequatur*, might be confined in a given legal system to enforcement of specific money judgments or injunctive orders in two-party disputes, rather than collective insolvency proceedings. Furthermore, recognition of foreign insolvency proceedings might not be considered as a matter of recognizing a "judgment". Recognition might be withheld, for example, if the foreign bankruptcy order is considered to be merely a declaration of status or if it is considered not to be final.

9. To the extent there is a lack of communication and coordination among courts and administrators from concerned jurisdictions, it is more likely that assets would be concealed or dissipated, and possibly liquidated without reference to other possible, more advantageous, solutions. As a result, not only is the ability of creditors to receive payment diminished, but so also

is the possibility of rescuing financially-viable businesses and of saving jobs. By contrast, the presence in national legislation of mechanisms for a coordinated administration of cases of cross-border insolvency makes it possible to adopt solutions that are sensible from the point of view of the legitimate interests of the creditors and the debtor; such mechanisms are therefore perceived as advantageous for foreign investment and trade.

10. The Model Provisions take into account other international efforts. Those include the European Union Convention on Insolvency Proceedings, the European Convention on Certain International Aspects of Bankruptcy ("Istanbul Convention", 1990), the Montevideo Private International Law Treaties of 1889 and 1940, the Convention regarding Bankruptcy between Nordic States (1933) as well as the Havana Convention of 1928 ("Bustamante Code"). Proposals from non-governmental organizations include the Model International Insolvency Cooperation Act (MIICA) as well as the Cross-Border Insolvency Concordat, both developed by Committee J of the Section on Business Law of the International Bar Association (IBA).

III. MAIN FEATURES OF MODEL PROVISIONS

A. Model Provisions fitting into existing national law

11. With a scope limited to procedures for dealing with some aspects of cross-border cases, the Model Provisions are intended to operate as an integral part of existing national insolvency statutes. This is manifested in several ways:

- the amount of possibly new terminology added to existing law by the Model Provisions is limited (e.g. terms specific to the context, such as "foreign proceedings" and "foreign representative"). The terms used are such that they are unlikely to be in conflict with terminology in existing law;

- the Model Provisions present to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law;

- recognition of foreign proceedings does not prevent local creditors from initiating collective insolvency proceedings in the enacting State (art. 22);

- relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against undue prejudice, as well as to compliance with the procedural requirements of the enacting State and to applicable notification requirements (art. 19);

- the Model Provisions retain the possibility of excluding or limiting the effects of recognition on the basis of overriding public policy considerations (art. 6);

- the Model Provisions are in the form of model legislation and possess the flexibility suited for taking into account differing approaches in national insolvency laws and varied propensities of States to cooperate in insolvency matters and to coordinate insolvency proceedings (art. 21).

12. Despite the useful flexibility with which the Model Provisions may be incorporated in the national law, it is useful to bear in mind the desirability of their uniform interpretation, which makes it advisable to limit deviations from the uniform text to the minimum. One advantage of uniformity is that it will make it easier for the enacting States to obtain cooperation from other States in insolvency matters. Thus, the flexibility to adapt the Model Provisions to the legal system of the enacting State should be utilized with due consideration for the need for uniformity and for the benefits to the enacting State in adopting modern, generally acceptable international practices in insolvency matters.

B. Scope of application of Model Provisions

13. The Model Provisions apply in a number of cross-border insolvency situations. Those include: (a) the case of an inward-bound request for recognition of a foreign proceeding; (b) an outward-bound request from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) requests for coordination of proceedings taking place concurrently in the enacting State and another State; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State (art. 1).

C. Types of foreign proceedings covered

14. A foreign insolvency proceeding, in order to fall within the scope of the Model Provisions, needs to possess certain attributes. These include: basis in insolvency-related law of the originating State; collective representation of creditors; and control or supervision of the assets and affairs of the debtor by a court or another official body (art. 2(a)).

15. Thus, it is intended that a variety of collective proceedings would be capable of recognition, including compulsory or voluntary, corporate or individual, winding-up or reorganization, as well as those in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments; "debtor in possession").

16. An inclusive approach has been used also as regards the possible types of debtors covered by the Model Provisions. The only exception concerns financial institutions and insurance companies specially regulated under the laws of the enacting State, which are excluded from the scope of application of the Model Provisions (art. 1(2)).

D. Foreign assistance for insolvency proceedings taking place in the enacting State

17. In addition to equipping the courts of the enacting State to deal with incoming requests for recognition, the Model Provisions permit the courts of the enacting State to seek assistance abroad on behalf of proceedings taking place in the enacting State.

18. Addition of the authorization for the courts of the enacting State to seek cooperation abroad may help to fill a gap in legislation in some States. Without such legislative authorization, the courts may, in some legal systems, feel constrained from seeking such assistance abroad. This creates potential obstacles to a coordinated international response in case of cross-border insolvency.

19. The Model Provisions may similarly help an enacting State fill gaps in its legislation as to the "outward" powers of persons appointed to administer insolvency proceedings under the local insolvency law. Article 5 authorizes those persons to act abroad for the purpose of seeking recognition of, and assistance for, those proceedings.

E. Foreign representative's access to courts of the enacting State

20. An important objective of the Model Provisions is to provide for expedited procedures for giving access to foreign representatives to the courts of the enacting State. Such access provides the opportunity for fast action to be taken in the event of a cross-border insolvency. It avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications which might otherwise have to be used. This helps to increase the likelihood of a coordinated, cooperative approach to the case of cross-border insolvency.

21. In addition to establishing the principle of direct court access for the foreign representative, the Model Provisions:

- establish simplified proof requirements for seeking recognition and relief for foreign proceedings, avoiding time-consuming "legalization" requirements involving notarial or consular procedures (art. 13);

- provide that the foreign representative is entitled to commence an insolvency proceeding in the enacting State (if the conditions therefor are otherwise met) and that the foreign representative may participate in an insolvency proceeding in the enacting State (arts. 9 and 10);

- confirm, subject to other requirements of the enacting State, access of foreign creditors to the courts of the enacting State for the purpose of opening in the enacting State an insolvency proceeding or participating in such a proceeding (art. 11).

- give the foreign representative the right to intervene in individual actions in the enacting State affecting the debtor or its assets (art. 20);

- provide that the mere fact of a petition for recognition in the enacting State does not mean that the courts in that State have jurisdiction over the debtor's entire assets and affairs (art. 8).

F. Recognition of foreign proceedings

(a) Determination of whether to recognize a foreign proceeding

22. The Model Provisions establish a test for deciding whether to grant recognition of a foreign proceeding (arts. 13 and 14) and provide that, in appropriate cases, the court may grant interim relief pending a decision on recognition (art. 15). The test involves an assessment of the basis of the jurisdiction of the court from which the foreign proceeding emanates, and includes a determination of whether the jurisdictional link on the basis of which the foreign proceeding was opened was such that it should be considered as a "main" or "non-main" foreign insolvency proceeding.

23. A foreign proceeding is deemed to be the "main" proceeding if the proceeding has been opened in the State where "the debtor has the centre of its main interests". That formulation corresponds to the one found in the European Union Convention on Insolvency Proceedings (art. 3 of that Convention). This allows the Model Provisions to build on the developing harmonization as regards the notion of a "main" proceeding. The determination that a foreign proceeding is "main" may affect the nature of the relief accorded to the foreign representative.

(b) Relief available to a foreign representative

24. A key element of the relief accorded upon recognition of the representative of a foreign "main" proceeding is that of a stay of actions of individual creditors against the debtor or a stay of enforcement proceedings concerning the debtor's assets, and a suspension of the debtor's right to transfer or encumber its assets (art. 16(1)(a) and (b)). Such stay and suspension are "mandatory" in the sense that they either flow automatically from the recognition of a foreign main proceeding or the court is bound to issue the appropriate order. The stay of actions or of enforcement proceedings is necessary to provide a "breathing space" until appropriate measures are taken for reorganization or fair liquidation of the debtor's affairs and assets. The suspension of transfers is necessary because in the modern, globalized economic system it is possible for multi-national debtors to move money and property across boundaries quickly. The mandatory moratorium triggered by the recognition of the foreign main proceeding thus provides a quick "freeze" essential to prevent fraud, protect the legitimate interests of the parties involved until the court has an opportunity to notify all concerned and to assess the situation.

25. Exceptions and limitations to the scope of the stay and suspension are determined by provisions governing comparable stays and suspensions in insolvency proceedings under the laws

of the enacting State (e.g. exceptions for secured claims, payments by the debtor made in the ordinary course of business, set-off, execution of rights *in rem*).

26. In addition to such "mandatory" stay and suspension, the Model Provisions authorize the court to grant "discretionary" relief for the benefit of any proceeding (whether "main" or not) (art. 17). Such discretionary relief, to be granted to the extent the court considers it appropriate, includes, in addition to the stay and suspension, for example, facilitating access to information concerning the debtor's assets and liabilities, preservation and management of those assets, and any other relief that may be available under the laws of the enacting State.

(c) Protection of local interests

27. In order to provide sufficient opportunity for adequate protection of the interests of the creditors (in particular local creditors), the debtor or other affected persons, it is provided, for example, that, when recognition is accorded to a foreign representative, notice thereof must be given as provided by the insolvency law of the enacting State (art. 18); that the court may subject the relief it grants to conditions it considers appropriate (art. 19(2)); and that the court may modify or terminate the relief granted, [including the "mandatory" stay or suspension resulting pursuant to article 16,] if so requested by a person affected thereby (art. 19(3)).

G. Cross-border cooperation

28. A widespread limitation on cooperation and coordination between judges from different jurisdictions in cases of cross-border insolvency derives from the lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authority, for pursuing cooperation with foreign courts.

29. Experience has shown that, irrespective of the discretion courts may traditionally enjoy in a State, the passage of a specific legislative framework is useful for promoting international cooperation in cross-border cases. Accordingly, the Model Provisions fill the gap found in many national laws by expressly empowering courts to extend cooperation in the areas governed by the Model Provisions (art. 21).

30. For similar reasons, provisions are included authorizing cooperation between a court in the enacting State and a foreign representative, and between a person administering the insolvency proceeding in the enacting State and a foreign court or a foreign representative (art. 21).

31. To assist end-users of the Model Provisions, space is left for listing additional forms of cooperation. It is advisable to keep the list illustrative rather than exhaustive so as not to stymie the ability of courts to fashion remedies in keeping with specific circumstances.

H. Concurrent proceedings

32. The Model Provisions provide an opportunity for the enacting State to include in its insolvency law a clear statement of the effect that recognition of a foreign proceeding would have on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings. The Model Provisions state that, even after recognition of a foreign "main" proceeding, jurisdiction remains with the courts of the enacting State to institute an insolvency proceeding if the debtor has assets in the enacting State (art. 22). If the enacting State would wish to restrict its jurisdiction to cases where the debtor has not only assets but an establishment in the enacting State, the adoption of such a restriction would not be contrary to the policy underlying the Model Provisions.

33. In addition, the Model Provisions deem the recognized foreign proceeding to constitute proof that the debtor is insolvent for the purposes of commencing local proceedings. This rule may be helpful in those legal systems in which commencement of insolvency proceedings requires proof that the debtor is in fact insolvent. Avoidance of repeated proof of financial failure reduces the likelihood that a debtor may delay proceedings long enough to conceal or carry away assets.

34. Another rule designed to enhance coordination of concurrent proceedings is the one on rate of payment of creditors (art. 23). It provides that a creditor, by claiming in more than one proceeding, does not receive more than the proportion of payment that is obtained by other creditors of the same class.

IV. ARTICLE-BY-ARTICLE REMARKS

Title

35. The title uses the term "insolvency". In some jurisdictions the term has a narrow technical meaning in that it may refer, for example, only to collective proceedings involving a company or a similar legal person, or only to collective proceedings against a natural person; in those jurisdictions, another term, such as "bankruptcy" may be used to refer to proceedings other than "insolvency" proceedings. No such distinction is intended to be drawn by the use of the term "insolvency" in the Model Provisions, since these Provisions are designed to be applicable to proceedings regardless of whether they involve a natural or legal person as the debtor.

36. Upon enactment, it may have to be considered whether the title of the Model Provisions, as incorporated into the national insolvency law, should be adapted to the terminology used in the local law. At the same time, it is desirable when referring to foreign proceedings to utilize terminology consistent with the substance of article 2(a) so as to provide for the broadest possible recognition of foreign proceedings. Perhaps it would suffice to entitle the section in the national law enacting the Model Provisions along the lines of "cross-border proceedings" or

"foreign proceedings". This would avoid utilizing terms such as "insolvency" or "bankruptcy", which may, for the present purposes, have too narrow a technical meaning in some legal systems.

Preamble

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor's assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

37. The Preamble gives a succinct statement of the basic policy objectives of the Model Provisions. It is not intended to create substantive rights, but rather to give a general orientation for users of the Model Provisions as well as to assist in the interpretation of the Model Provisions.

38. In States where it is not customary to set out preambular statements of policy in legislation, consideration might be given to including the statement of objectives either in the body of the statute or in a separate document, so as to preserve a useful tool for the interpretation of the law.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This [Law] [Section] applies where:

(a) assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) assistance is sought in a foreign State in connection with a proceeding in this State under [identify laws of the enacting State relating to insolvency]; or

(c) a foreign proceeding and a proceeding in this State under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or

(d) creditors or other interested parties in a foreign State have an interest in requesting the commencement of or participating in a proceeding in this State under [identify laws of the enacting State relating to insolvency].

(2) This [Law][Section] does not apply where the debtor is a [insert the designations of specially regulated financial services institutions such as banks and insurance companies], if the debtor's insolvency in this State is subject to special regulation.

39. The words "[Law][Section]" are used in article 1 to emphasize that in many instances the Model Provisions would be enacted as an additional "section" in the existing insolvency law. However, throughout the remainder of the Model Provisions only the word "Law" is used.

40. The expression "this State" is used in the preamble and throughout the Model Provisions to refer to the State that is enacting the text. The national statute may use another expression that is customarily used for that purpose.

41. "Assistance" in paragraph (1)(a) and (b) is meant to cover various situations, dealt with in the Model Provisions, in which a court or an insolvency administrator may make a cross-border request directed to a court or an insolvency administrator for a measure to be taken as envisaged in the Model Provisions. Some of those measures are specifically mentioned in the Model Provisions, while others are covered by a broader formulation such as the one in article 17(1)(f).

42. [Paragraph (2): reasons for excluding financial institutions from the Model Provisions.]

Article 2. <u>Definitions</u>

For the purposes of this Law:

(a) "foreign proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "foreign main proceeding" means a proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "foreign non-main proceeding" means a proceeding taking place in the State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) "foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

43. Since the Model Provisions will be embedded in the national insolvency law, article 2 only needs to define the terms specific to cross-border scenarios. Thus, the Model Provisions contain definitions of the terms "foreign proceeding" and "foreign representative", but not of the person or body that may be entrusted with the administration of the debtor's assets in an insolvency proceeding in the enacting State. To the extent that it would be necessary to define in the national statute the term used for such a person or body, this may be added to the legislation enacting the Model Provisions.

44. The definitions used in the Model Provisions, when they refer to proceedings or persons emanating from foreign jurisdictions, are phrased in "functional" rather than in specific technical terms that may be utilized in one or the other jurisdiction. This technique is used to avoid inadvertently narrowing the range of possible foreign proceedings that might obtain recognition, and to avoid unnecessary conflict with terminology used in the laws of the enacting State (see also above, para. 11). As noted above in paragraph 35, the term "insolvency" is an example of a term that may have a technical meaning in some legal systems, but which is intended here (subparagraph (a)) to refer broadly to companies in severe financial distress.

45. The definition of the term "establishment" (subparagraph (f)) has been modelled on article 2(h) of the European Union Convention on Insolvency Proceedings. The use of this term and its definition is advisable so as to contribute to the harmonization of terminology; nevertheless, the enacting State might decide to use some other term or definition if it is commonly used in the State to refer to this type of "business presence".

Article 3. <u>International obligations of this State</u>

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

46. In incorporating article 3, to the extent that is considered useful by the enacting State, it may be noted that the exception for international obligations is meant to refer to obligations at

the inter-governmental level, and not to mere commercial agreements concluded by entities of the State.

Article 4. Competent authority[a]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by *[specify the court, courts or authority competent to perform those functions in the enacting State]*.

"[a] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

"Nothing in this Law affects the provisions in force in this State governing the authority of *[insert the designation of the government-appointed person or body]*."."

47. If in the enacting State any of the functions mentioned in article 4 are performed by an authority other than a court, the State would insert in article 4 and in other appropriate places in the enacting legislation the name of the competent authority.

48. The competence for the various judicial functions dealt with in the Model Provisions may lie with different courts in the enacting State, and the enacting State would tailor the text of the article to its own system of court competence. The value of article 4, as enacted in a given State, would be to increase the transparency and ease of use of the insolvency legislation for the benefit of, in particular, foreign representatives and foreign courts.

49. It is important to note that, in defining jurisdiction in matters mentioned in article 4, the implementing legislation should not unnecessarily limit the jurisdiction of other courts in the enacting State, in particular to entertain requests by foreign representatives for provisional relief.

50. In a number of States, insolvency legislation has entrusted certain tasks relating to the supervision of the insolvency process to government-appointed officials. The scope and nature of their duties, which vary widely from State to State, may include, for example: [...]. It is not the purpose of the Model Provisions to interfere with the authority of such officials, a point that some enacting States may wish to clarify in the law, as indicated in the footnote.

Article 5. Authorization of *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* to act in a foreign State

A *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is authorized to act in a foreign State on behalf of a proceeding in this State under *[identify laws of the enacting State relating to insolvency]*, as permitted by the applicable foreign law.

51. The intent of article 5 is to equip administrators or other authorities appointed in insolvency proceedings commenced in the enacting State to act abroad as foreign representatives of those proceedings. The lack of such authorization in some States has proved to be an obstacle to effective international cooperation in cross-border cases. An enacting State in which administrators are already equipped to act as foreign representatives may decide to forgo inclusion of article 5.

52. It may be noted that article 5 is formulated to make it clear that the scope of the power exercised abroad by the administrator would depend upon the foreign law and courts. Actions that the administrator appointed in the enacting State may wish to take in a foreign country will be actions of the type that are dealt with in the Model Provisions, but the authority to act in a foreign country does not depend on whether that country has enacted legislation based on the Model Provisions.

Article 6. Public policy exceptions

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

53. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted. With a view to achieving the objectives of the Model Provisions, it is desirable not to encourage resort to the public policy exception provided in article 6. Accordingly, article 6 should be enacted in at least as limited a formulation as that contained in the Model Provisions.

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 7. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

54. The article is limited to expressing the principle of direct access by the foreign representative to courts of the enacting State, thus freeing the representative from having to meet formal requirements such as licences or consular actions. Notably, the article does not deal with the allocation of competence of the courts in the enacting State for providing relief to the foreign representative.

Article 8. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

55. The limitation on jurisdiction over the foreign representative embodied in article 8 is not absolute. It is only intended to shield the foreign representative to the extent necessary to make court access a meaningful proposition. It does so by providing that an appearance in the courts of the enacting State for the purpose of requesting recognition would not expose the entire estate under the supervision of the foreign representative to the jurisdiction of those courts. Other possible grounds for jurisdiction under the laws of the enacting State are not affected.

56. The article may appear superfluous in States where the rules on jurisdiction do not allow a court to assume jurisdiction over a person making an application to the court on the sole ground of the applicant's appearance. Nevertheless, also in those States it would be useful to enact the article so as to eliminate the concern of foreign representatives or creditors over the possibility of all-embracing jurisdiction triggered by an application for relief.

Article 9. Application by a foreign representative to commence a proceeding under *[identify laws of the enacting State relating to insolvency]*

[Upon recognition,] a foreign representative may apply to commence a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* if the conditions for commencing such a proceeding under the law of this State are otherwise met.

57. In national laws that, in enumerating persons who may request the commencement of an insolvency proceeding, do not mention a representative of a foreign insolvency proceeding, it might be doubtful whether such a representative has standing for making the request. Article 9 is designed to ensure that the foreign representative [subject to recognition of the foreign proceeding] has standing for requesting the opening of an insolvency proceeding. However, the article does not modify the conditions under which an insolvency proceeding may be commenced in the enacting State.

Article 10. Participation of a foreign representative in a proceeding under *[identify laws of the enacting State relating to insolvency]*

Upon recognition of a foreign proceeding, the foreign representative may participate in a proceeding concerning the debtor in this State under *[identify laws of the enacting State relating to insolvency]*.

58. The purpose of the provision is to ensure that, in the insolvency proceeding concerning the debtor, the foreign representative will be given standing to make petitions, requests or submissions concerning issues, such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding. Notably, the provision does not vest the foreign representative with any specific powers or rights. The provision does not specify the kinds of motions the foreign representative might make and does not affect the provisions in the insolvency law of the enacting State that govern the fate of the motions.

59. If the law of the enacting State uses a term other than "participate" (e.g. "intervene") to express the concept, such other term may be used in enacting the provision. It should be noted, however, that the expression "intervene", as used in article 20, covers a case where the foreign representative takes part in an individual action by or against the debtor (as opposed to a collective insolvency proceeding).

Article 11. Access of foreign creditors to a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Subject to paragraph (2) of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* as creditors in this State.

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]*, except that the claims of foreign creditors shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims]*.[b]

---

[b] **The enacting State may wish to consider the following alternative wording to replace article 11 (2):**

(2) Paragraph (1) of this article does not affect the ranking of claims in a proceeding under *[identify laws of the enacting State relating to insolvency]* and the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than *[identify the class of unsecured non-preference claims, while providing that a foreign claim is to be ranked lower than the unsecured non-preference claims if an equivalent local claim (e.g. claim*

for a penalty or deferred-payment claim) has a rank lower than the unsecured non-preference claims].

60. With the exception contained in paragraph (2), the article embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such proceeding, should not be treated worse than local creditors.

61. Paragraph (2) makes it clear that the principle of non-discrimination embodied in paragraph (1) leaves intact the provisions on the ranking of claims in insolvency proceedings, including any provisions that might assign a special ranking to claims of foreign creditors. However, lest the non-discrimination principle should be emptied of its meaning by provisions giving the lowest ranking to foreign claims, paragraph (2) establishes the minimum ranking for claims of foreign creditors: the rank of general unsecured claims. The exception to that minimum ranking is provided for the cases where the claim in question, if it were of a domestic creditor, would be ranked lower than general unsecured claims (such low-rank claims may be, for instance, those of a State authority for financial penalties or fines or claims whose payment is deferred because of a special relationship between the debtor and the creditor). Those special claims will receive the rank below the general unsecured claims, as provided in the law of the enacting State.

62. The alternative provision in the footnote differs from the provision in the text only in that it allows discrimination against foreign tax and social security claims.

Article 12. Notification to foreign creditors of a proceeding under *[identify laws of the enacting State relating to insolvency]*

(1) Whenever under *[identify laws of the enacting State relating to insolvency]* notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have an address in this State. [The court may order that appropriate steps be taken with a view to notifying any creditors whose address is not yet known.]

(2) Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

(3) When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) indicate a reasonable time period for filing claims and specify the place for filing of claims;

(b) indicate whether secured creditors need to file their secured claims; and

(c) contain any other information required to be included in notifications to creditors pursuant to the law of this State and the orders of the court.

63. The main purpose of notifying foreign creditors as provided in paragraph (1) is to inform them of the commencement of the insolvency proceeding and of the time limit to file their claims. However, since in many cases the deadline for filing claims is not established in the notification issued upon the commencement of the proceeding, and since crucial information may be conveyed in subsequent notifications to creditors, it is necessary to require, as it is done in paragraph (1), that foreign creditors be notified whenever notification is required for creditors in the enacting State.

64. In some legal systems a secured creditor who files a claim in the insolvency proceeding is deemed to have waived the security or some of the privileges attached to the credit. Where such a situation may arise, it would be appropriate for the enacting State to include in paragraph (3) a requirement that the notification should include information regarding the effects of filing secured claims.

65. As to the form of the notification to be given to foreign creditors, States have different provisions or practices (e.g. publication in the official gazette or in local newspapers, individual notices, affixing notices within the court premises or a combination of any such procedures). If the form of notification were to be left to national law, foreign creditors would be in a less advantageous situation than local creditors, since they typically do not have direct access to local publications. For that reason, paragraph (2) as a matter of principle requires individual notification for foreign creditors, but nevertheless leaves discretion to the court to decide otherwise (e.g. if individual notice would entail excessive cost or would not seem feasible under the circumstances).

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 13. Recognition of a foreign proceeding and of a foreign representative

(1) A foreign representative may apply to the competent court for recognition of the foreign proceeding and of the foreign representative's appointment.

(2) An application for recognition shall be accompanied by:

(a) the duly authenticated decision [or decisions] commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) Subject to article 14, the foreign proceeding shall be recognized:

(a) as a foreign main proceeding if the foreign court has jurisdiction based on the centre of the debtor's main interests; or

(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of article 2(f) in the foreign State.

(4) Absent proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is deemed to be the centre of the debtor's main interests.

(5) If the decision or certificate referred to in paragraph (2) of this article indicates that the foreign proceeding is a proceeding as defined in article 2(a) and that the foreign representative has been appointed within the meaning of article 2(d), the court is entitled to so presume.

(6) No legalization of documents supplied in support of the application for recognition or other similar formality is required.

(7) The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

(8) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

66. The article defines the core procedural requirement for an application by a foreign representative for recognition. In incorporating the provision into national law, it is particularly desirable not to encumber the process with additional documentary requirements beyond those referred to.

67. The requirement, in paragraph (2)(a), that the decision commencing the foreign proceeding must be duly "authenticated" means that the copy of the court order or decision commencing or confirming the commencement of the foreign proceeding must bear a clause, seal or other mark that is normally used to attest that the document is a true copy and that it originates from the stated source. Apart from that, as stated in paragraph (6), the document need not be "legalized", i.e. need not be presented to the authorities (e.g. consular agents) that are competent for inspecting and appropriately marking certain types of documents to be used outside their country of origin. Again, one important reason to avoid unnecessary formalities is the need for speed to secure assets and reduce the likelihood of the assets being concealed.

68. The basic distinction is drawn in paragraph (3) between foreign proceedings categorized as "main" proceedings, and those foreign proceedings that are not so characterized, depending upon the jurisdictional basis of the foreign proceeding. The relief flowing from recognition may depend upon the category into which a foreign proceeding falls. For example, recognition of a foreign "main" proceeding triggers a stay of individual creditor actions against assets.

69. It is not advisable to include several criteria for qualifying a foreign proceeding as a "main" proceeding and provide that on the basis of any of those criteria a proceeding could be

deemed a main proceeding. Such a "multiple criteria" approach would raise the risk of competing claims from foreign proceedings for recognition as the main proceeding.

Article 14. Grounds for refusing recognition

[Subject to article 6,] recognition of a foreign proceeding and of the appointment of the foreign representative may be refused only where:

(a) the foreign proceeding is not a proceeding as defined in article 2(a) or the foreign representative has not been appointed within the meaning of article 2(d); or

(b) ... [1]

---

[1] Subparagraph (b) would be the appropriate location for including any additional ground for refusing to recognize a foreign proceeding, should the Commission so decide.

70. [To be drafted in light of the decision of the Commission on the content of the article.]

Article 15. Relief upon application for recognition of a foreign proceeding

(1) From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign representative, where necessary to protect the assets of the debtor or the interests of the creditors, grant any relief mentioned in article 17.

(2) *[Insert provisions (or refer to provisions in force in the enacting State) relating to notice].*

(3) Unless extended under article 17(1)(c), the relief granted under this article terminates when the application for recognition is decided upon.

(4) The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

71. Article 15 deals with relief that may be ordered at the discretion of the court (similarly as relief under article 17) and is available as of the moment of the application for recognition (unlike relief under article 17, which is available upon recognition).

72. Relief available under article 15 is provisional in that, as provided in paragraph (3), the relief terminates when the application for recognition is decided upon; however, the court is given the opportunity to extend the measure, as provided in article 17(1)(c), which the court

might wish to do, for example, to avoid a hiatus between the provisional measure issued before recognition and the measure issued after recognition.

73. It is useful to allow under article 15(1) all relief that might be allowed under article 17, since, to the extent such relief is needed, the need typically exists equally before and after recognition.

74. Relief under article 15 is not made subject to exceptions or limitations applicable under the law of the enacting State, as is provided in article 16(2). The reason is that relief under article 15 (as well as article 17) is discretionary and there is, therefore, no need to make the issuance of the discretionary relief subject to exceptions and limitations contained in the law of the enacting State.

75. Laws of many States contain requirements for notice to be given (either by the insolvency administrator upon the order of the court or by the court itself) when relief of the type mentioned in article 15 is granted. Paragraph (2) is the location where the enacting State should make appropriate provision for such notice.

Article 16. Effects of recognition of a foreign main proceeding

(1) Upon recognition of a foreign main proceeding,

(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities are stayed;

(b) the right to transfer, dispose of or encumber any assets of the debtor are suspended.

(2) The scope of the stay and suspension referred to in paragraph (1) of this article is subject to *[refer to any exceptions or limitations that are applicable under laws of the enacting State relating to insolvency]*.

(3) Paragraph (1)(a) of this article does not affect the right to commence individual actions or proceedings, to the extent this is necessary to preserve a claim against the debtor.

(4) Paragraph (1) of this article does not affect the right to request the commencement of a proceeding under *[identify laws of the enacting State relating to insolvency]* or the right to file claims in such a proceeding.

[(5) This article does not apply if, at the time of application for recognition, a proceeding is pending concerning the debtor under *[identify laws of the enacting State relating to insolvency]*.]

76. While relief under articles 15 and 17 is discretionary, the effects provided by article 16(1) are not, i.e. they either flow automatically from recognition of the foreign main proceeding or, if

an appropriate court order is needed for those effects to become operative, the court must issue the order. Notwithstanding the "mandatory" nature of the relief under article 16, its scope depends on exceptions or limitations that may exist in the law of the enacting State (e.g. as regards the enforcement of claims by secured creditors, payments by the debtor in the ordinary course of business, or completion of open financial-market transactions). Another difference between relief under articles 15 and 17 and the effects under article 16 is that the relief under articles 15 and 17 may be issued in favour of main as well as non-main proceedings, while the effects of article 16 apply only to main proceedings.

77. Paragraph (1)(a) refers to both "individual actions" and "individual proceedings" in order to cover, in addition to "actions" by creditors in a court against the debtor or its assets, also enforcement measures initiated by creditors outside judicial proceedings, measures that creditors are allowed to take under certain conditions in some States.

78. It would not be feasible for the Model Provisions to deal with sanctions that might apply to acts performed in defiance of the suspension of transfers of assets provided under paragraph 16(1)(b). The sanctions vary in legal systems, and might include criminal sanctions, penalties and fines, or the acts themselves might be void or capable of being set aside. It should be noted that, from the viewpoint of creditors, the main purpose of such sanctions is to facilitate recovery for the insolvency proceeding of any assets improperly transferred by the debtor and that, for that purpose, the avoidance of such transactions is preferable to the imposition of criminal or administrative sanctions on the debtor.

79. Article 16 does not address the effect of the stay pursuant to paragraph (1)(a) on the running of the limitation period for claims or individual court actions. With a view to avoiding adverse effects to creditors affected by the stay under paragraph (1)(a), paragraph (3) authorizes the commencement of individual actions but only to the extent necessary to preserve claims against the debtor. Once the claim has been preserved, the action continues to be covered by the stay. If in the enacting State it is provided that the stay of the kind envisaged in paragraph (1)(a) triggers the interruption of the running of limitation periods, the enacting State may decide not to enact paragraph (3).

Article 17. Relief that may be granted upon recognition of a foreign proceeding

(1) Upon recognition of a foreign main or non-main proceeding, where necessary to protect the assets of the debtor or the interests of creditors, the court may, at the request of the foreign representative, grant any appropriate relief including:

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under article 16(1)(a);

(b) suspending the right to transfer, dispose of or encumber any assets of the debtor to the extent they have not been suspended under article 16(1)(b);

(a) extending relief granted under article 15;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration and realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) granting any additional relief that may be available to *[insert the title of a person or body administering a liquidation or reorganization under the law of the enacting State]* under the laws of this State.

(2) Upon recognition of a foreign main or non-main proceeding, the court may entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

(3) In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets falling under the authority of the foreign representative or concerns information required in that foreign non-main proceeding.

80. Relief envisaged by article 17 may be granted upon recognition of the foreign proceeding (unlike relief under article 15, which is available upon application for recognition).

81. Relief under article 17 is discretionary, as is the case with relief under article 15. This makes it possible to tailor the relief to the needs of the case. One particular factor to be taken into account in adapting relief to the circumstances of the case is whether the relief is for a foreign main or non-main proceeding. The interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets

of the insolvent debtor. Paragraph (3) emphasizes that point by providing a binding guideline to be observed by the court when it grants relief in favour of a foreign non-main proceeding.

82. The explanation relating to the use of the expressions "individual actions" and "individual proceedings" in article 16(1)(a) applies also to article 17(1)(a).

83. As to the "turnover" of assets to the foreign representative (or another person), as envisaged in paragraph (2), it should be noted that the Model Provisions contain several safeguards designed to ensure the protection of local interests, such as: the general statement of the principle of protection of local interests in article 19(1); the notice provision in article 18 and the related possibility that the court delays the turnover of assets until it is assured that the local creditors have either been paid or that their interests will be protected in the foreign proceeding; and article 19(2), according to which the court may subject the relief it grants to conditions it considers appropriate.

Article 18. Notice of recognition and relief granted upon recognition

Notice of recognition of a foreign proceeding [and of the effects of recognition of a foreign main proceeding under article 16] shall be given in accordance with *[the procedural rules governing notice of [the commencement of] a proceeding under the insolvency laws of this State]*.

84. The notice requirement, provided in the interest of local creditors and other interested local persons, does not describe in detail the kind of information to be provided in the notice. If the court considers it necessary that particular information be included in the notice (e.g. about the stay and suspension pursuant to article 16 or the relief granted under article 17), the court may give an appropriate order to the foreign representative, as a condition for granting relief, pursuant to article 19(2).

Article 19. Protection of creditors and other interested persons

(1) In granting or denying relief under article 15 or 17, and in modifying or terminating relief under this article, the court [shall take into account the interests of the creditors and other interested persons, including the debtor] [must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected].

(2) The court may subject such relief to conditions it considers appropriate.

(3) Upon request of a person or entity affected by relief granted under article 15 or 17, [or by the stay or suspension pursuant to article 16(1)], the court may modify or terminate such relief [, stay or suspension] [, taking into account the interests of the creditors and other interested persons, including the debtor].

85. The article makes the consequences of articles 15, 16 and 17 subject to court-imposed conditions and allows those consequences to be modified and terminated by the court. Furthermore, the article expressly gives standing to the parties who may be affected by the

consequences of articles 15, 16 and 17 to petition the court for those consequences to be modified and terminated. Thereby the provision provides effective underpinning to the policy, impliedly pursued at various places in the Model Provisions, that all affected interests in the enacting State should be given due regard in tailoring the relief that the Model Provisions make available to foreign proceedings. The article is intended to operate in the context of the procedural system of the enacting State.

Article 19 *bis*. Actions to avoid acts detrimental to creditors

Upon recognition of a foreign proceeding, the foreign representative [is permitted] [has standing] to initiate *[refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available, according to the law of the enacting State, to the local insolvency administrator in the context of insolvency proceedings in the enacting State].*

86. The provision is drafted narrowly in that it is limited to conferring procedural standing to the foreign representative to bring such actions (to the same extent as a local insolvency administrator), in particular, the provision does not create any substantive right regarding the initiation of such action and also does not provide any conflict-of-laws solution for such actions.

87. The issue of court actions aimed at avoiding or otherwise rendering ineffective transactions by the debtor that are detrimental to creditors is of great complexity and the conditions under which such actions can be brought, or the law applicable to them, do not seem to lend themselves to harmonized solutions. However, since the right to commence such actions is essential to protect the integrity of the assets of the debtor, and is often the only realistic way to achieve such protection, it is important to ensure that such right would not be denied to a foreign representative on the sole ground that he or she has not been locally appointed.

88. It may be noted that under many national laws individual creditors have a right to bring actions to avoid or otherwise render ineffective acts detrimental to creditors. Such actions are typically governed by general provisions of law (such as the Civil Code) and are not necessarily tied to the existence of an insolvency proceeding against the debtor, and the right to bring them typically belongs to any affected creditor and not to other persons such as the person appointed to administer the debtor's assets. Such actions do not fall within the scope of article 19*bis*.

Article 20. Intervention by a foreign representative in actions in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in [individual actions] [proceedings] in which the debtor is a [claimant or defendant] [party].

89. The word "intervene" in the context of article 20 is intended to express the idea that the foreign representative has standing to appear in court and make representations in individual actions by the debtor against a third party or by a third party against the debtor. Many if not all national procedural laws contemplate cases where a party (the foreign representative in the current provision) who demonstrates a legal interest in the outcome of a dispute between two other parties may be permitted by the court to be heard in the proceedings. National procedural

systems refer to such situations by different expressions, among which the expression "intervention" is frequently used. If the enacting State uses another expression for that concept, the use of such other expression in enacting article 20 would be appropriate.

90. It should be noted that the expression "participate" in article 10 refers to a case where the foreign representative makes representations in a collective insolvency proceeding, whereas the expression "intervene" in article 20 covers a case where the foreign representative takes part in an individual action by, or against, the debtor.

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Article 21. Authorization of cooperation and direct communication with foreign courts and foreign representatives

(1) In matters referred to in article 1, a court referred to in article 4 shall cooperate to the maximum extent possible with foreign courts, either directly or through a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* or a foreign representative. The court is permitted to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

(2) In matters referred to in article 1, a *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* shall, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives. The *[insert the title of the person or body administering a liquidation or reorganization under the law of the enacting State]* is permitted, in the exercise of its functions and [subject to the supervision] [without prejudice to the supervisory functions] of the court, to communicate directly with foreign courts or foreign representatives.

(3) Cooperation may be implemented by any appropriate means, including:

(a) appointment of a person or body to act at the direction of the court;

(b) communication of information by any means deemed appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) [coordination of multiple proceedings regarding the same debtor] [coordination of main or non-main foreign proceedings and a proceeding in this State under *[identify laws of the enacting State relating to insolvency]* in respect of the same debtor;

(f) *[the enacting State may wish to list additional forms or examples of cooperation].*

91. Article 21 is a core element in the Model Provisions in that it is designed to overcome a widespread lack in national legislation of provisions authorizing cooperation by domestic courts with foreign courts in administration of cross-border insolvencies. Enactment of such a legislative authorization may be particularly helpful in legal systems in which the discretion given to judges to operate outside areas of express statutory authorization is limited. However, even in jurisdictions in which there is a tradition of wider judicial latitude, enactment of a legislative empowerment and framework for cooperation has proven to be useful. The ability of courts, with appropriate involvement of the parties, to communicate "directly" and to request information and assistance "directly" from foreign courts or foreign representatives is intended to avoid the use of time consuming procedures traditionally in use, such as letters rogatory. This ability is critical when the courts consider that they should act with urgency.

92. Inclusion of the reference to international cooperation between persons who, under the supervision of their respective courts, administer the insolvency proceedings reflects the important role that such persons can play in devising and implementing cooperative arrangements, within the parameters of their authority and under overall supervision of the courts.

93. In view of the importance of emphasizing the expeditious character of the process envisaged, the enacting State may find it useful to indicate expressly that the courts are authorized to forgo use of the formalities (e.g. communication via higher courts, letters rogatory or other diplomatic or consular channels) that are inconsistent with the policy behind the provision and to address requests for information or assistance directly to foreign courts or foreign representatives.

94. Paragraph (3) is suggested to be used by the enacting State to provide courts with an indicative list of the types of cooperation that are authorized by article 21. Such an indicative listing may be particularly helpful in States with limited tradition of direct cross-border judicial cooperation, and in States where judicial discretion has traditionally been limited. Any listing of forms of possible cooperation should not purport to be exhaustive, as this might inadvertently preclude certain forms of appropriate cooperation.

95. Subparagraph (f) is a slot into which the enacting State may add additional forms of possible cooperation. Those might include, for example, suspension or termination of existing proceedings in the enacting State.

CHAPTER V. CONCURRENT PROCEEDINGS

Article 22. Concurrent proceedings

(1) Upon recognition of a foreign main proceeding, the courts of this State have jurisdiction to commence a proceeding in this State against the debtor under *[identify laws of the enacting State relating to insolvency]* only if the debtor has assets in this State, and the effects of that proceeding shall be restricted to the assets of the debtor situated in the territory of this State.

(2) Recognition of a foreign insolvency proceeding is, for the purposes of commencing a proceeding in this State referred to in paragraph (1) of this article and in the absence of evidence to the contrary, proof that the debtor is insolvent.

96. As a consequence of enactment of the Model Provisions, the enacting State would have in its legislation a system for recognition of foreign insolvency proceedings. This would include a method for distinguishing between foreign "main" and "non-main" proceedings. The next question that may arise in a legislator's mind is what residual competence to commence an insolvency proceeding in the enacting State would remain once a foreign proceeding has been recognized. The question has particular significance in the case of recognition of a foreign proceeding as the "main" proceeding, which has the potential of having the most wide-reaching effects. In such cases the local "non-main" proceeding is sometimes referred to as a "secondary" proceeding. Article 22 presents the enacting State with a method of allocation of jurisdiction in cases in which a foreign main proceeding has been recognized. In such cases, commencement of an insolvency proceeding would be possible if the debtor has assets in the enacting State.

97. Enactment of paragraph (2) may have particular significance when proving insolvency as the prerequisite for the commencement of a local insolvency proceeding would be a time-consuming exercise and of little benefit bearing in mind that the debtor is already in an insolvency proceeding elsewhere and the opening of a local proceeding may be urgently needed for the protection of local creditors. Nonetheless, local criteria for showing insolvency remain operative through the proviso that evidence to the contrary would be acceptable.

Article 23. Rate of payment of creditors

Without prejudice to [secured claims] [rights in rem], a creditor who has received part payment in respect of its claim in an insolvency proceeding commenced in another State may not receive a payment for the same claim in a proceeding commenced in this State under *[identify laws of the enacting State relating to insolvency]* with regard to the same debtor in this State, so long as the payment to the other creditors of the same class for their claims in the proceeding commenced in this State is proportionately less than the payment the creditor has already received.

98. The rule set forth in article 23, sometimes referred to as the "hotchpot" rule, is widely viewed as a useful safeguard in a legal regime for coordination and cooperation in the administration of cross-border insolvency proceedings. It is intended to ensure that a creditor,

by participating in proceedings in more than one jurisdiction, does not receive a greater proportion of repayment of claims than that received by other creditors of the same class.

V. ASSISTANCE FROM THE UNCITRAL SECRETARIAT

(a) Assistance in drafting legislation

99. The UNCITRAL Secretariat may assist States with technical consultations for the preparation of legislation based on the Model Provisions. Further information may be obtained from: the UNCITRAL Secretariat, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria, fax (43-1) 21345-5813, electronic mail: uncitral@unov.un.or.at, [new fax number to be introduced during the second half of 1997: (43-1) 26060-5813].

(b) Information on interpretation of legislation based on Model Provisions

100. Once enacted, the Model Provisions will be included in the system for collecting and disseminating information on case law relating to the Conventions and Model Laws that have emanated from the work of the Commission (Case Law on UNCITRAL Texts (CLOUT)). The purpose of the system is to promote international awareness of the legal texts formulated by the Commission and to facilitate uniform interpretation and application of them. The Secretariat publishes, in the six languages of the United Nations, abstracts of decisions and makes available, in the original language, the decisions on the basis of which the abstracts were prepared. The system is explained in document A/CN.9/SER.C/GUIDE/1, available from the Secretariat. Currently, CLOUT covers the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 1980, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), UNCITRAL Model Law on International Commercial Arbitration (1985) and the Hamburg Rules.

* * *

[It is suggested to include the following material at an appropriate place in the publication in which the Model Provisions and this Guide will be published.]

The Model Provisions were adopted by the United Nations Commission on International Trade Law (UNCITRAL) [at its thirtieth session (Vienna, 12-30 May 1997).] [Action by the General Assembly].

In addition to the 36 member States of the Commission, representatives of many other States and of a number of international intergovernmental and non-governmental organizations participated in the deliberations. The project, initiated in close cooperation with the International Association of Insolvency Practitioners (INSOL), benefitted from suggestions and expert advice from practitioners from many countries such as administrators of insolvent debtors' assets, attorneys, judges and officials concerned with insolvency matters. Consultations were facilitated, apart from the International Association of Insolvency Practitioners (INSOL), by Committee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA) and the Commission on International Bankruptcy Law of the International Association of Lawyers (Union Internationale des Avocats (UIA)).

After a preliminary discussion on the project by the Commission in 1993[1], and prior to the decision to undertake work on cross-border insolvency, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, Austria, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders. The suggestion arising from the Colloquium was that work by the Commission should, at least at the initial stage, have the limited but useful goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings.[2] Subsequently, an international meeting of judges was held specifically to elicit their views as to work by the Commission in that area (UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency, Toronto, Canada, 22-23 March 1995). The view of the participating judges and government officials was that it would be worthwhile for the Commission to provide a legislative framework for judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings[3].

The decision to develop a legal instrument relating to cross-border insolvency was taken at the twenty-eighth session of the Commission (Vienna, 2-26 May 1995)[4]. The work was assigned to the Working Group on Insolvency Law, one of the Commission's inter-

---

[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (Vienna, 5-23 July 1993), Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17) (reproduced in UNCITRAL Yearbook, vol. XXIV: 1993, part one, A), paras. 302-306.

[2] The report on the Colloquium was published as document A/CN.9/398 (reproduced in UNCITRAL Yearbook, vol. XXV: 1994, part two, V, B); the report was considered at the twenty-seventh session of the Commission (New York, 31 May - 17 June 1994); the considerations are reflected in Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17) (UNCITRAL Yearbook, vol. XXV: 1994, part one, A), paras. 215-222.

[3] The report on the Judicial Colloquium was published as document A/CN.9/413 (reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part two, IV, A); the report was considered at the twenty-eighth session of the Commission (Vienna, 2-26 May 1995); the considerations are reflected in Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (UNCITRAL Yearbook, vol. XXVI: 1995, part one, A), paras. 382-393.

[4] Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (UNCITRAL Yearbook, vol. XXVI: 1995, part one, A), paras. 392 and 393.

governmental subsidiary bodies. The Working Group devoted four two-week sessions to the work on the project.[5]

After the last of those Working Group sessions, the Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held (22-23 March 1997) in conjunction with the 5th World Congress of the International Association of Insolvency Practitioners (INSOL) (New Orleans, United States of America, 23-26 March 1997). The Colloquium considered the draft Model Provisions as they were prepared by the Working Group. The participants, mostly judges and government officials, were generally supportive of the draft, expressed suggestions on the substance of several provisions, and considered that the Model Provisions, when enacted, would constitute a major improvement in dealing with cross-border insolvency cases.

Further Colloquia involving judges and other practitioners are planned to be held to consider the experience with the Model Provisions.

* * *

---

[5] Report of the eighteenth session (Vienna, 30 October - 10 November 1995): document A/CN.9/419 (UNCITRAL Yearbook, vol. XXVII: 1996, part two); report of the nineteenth session (New York, 1-12 April 1996): document A/CN.9/422 (UNCITRAL Yearbook, vol. XXVII: 1996, part two); report of the twentieth session (Vienna, 7-18 October 1996): document A/CN.9/433 (UNCITRAL Yearbook, vol. XXVIII: 1997, part two); report of the twenty-first session (New York, 20-31 January 1997): document A/CN.9/435 (UNCITRAL Yearbook, vol. XXVIII: 1997, part two).